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In The Supreme Court of the United States

ALPHONSO L. GRANT, in his individual capacity and in his official capacity as a member of the City of Lynchburg Electoral Board and JOHN E. MASON, JR., in his individual capacity, et al.,

Petitioners,

v.

INEZ SALES and DEBRA M. MILLER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Henry S. Keuling-Stout
KEULING-STOUT, P.C.
125 Clinton Avenue, East
Post Office Box 400
Big Stone Gap, Virginia 24219
(540) 523-1676

Counsel for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

STAPP

QUESTIONS PRESENTED

Was it error for the Fourth Circuit to conclude that two public officials forever waived their claim of qualified immunity where the Fourth Circuit significantly changed the legally relevant factors to determining qualified immunity after the first but before a second trial?

PARTIES TO THE PROCEEDING

PETITIONERS

ALPHONSO L. GRANT, in his individual capacity and in his official capacity as a member of the City of Lynchburg Electoral Board and JOHN E. MASON, JR., in his individual capacity

and

DAVID T. PETTY, JR., in his official capacity as a member of the City of Lynchburg Electoral Board; CITY OF LYNCHBURG ELECTORAL BOARD; CAROL READ; ARELIA LANGHORNE, in her official capacity as a member of the City of Lynchburg Electoral Board ; JOHN COBB, in his official capacity as a member of the City of Lynchburg Electoral Board; ANNE MARIE MIDDLESWORTH, in her official capacity as general registrar of the City of Lynchburg

RESPONDENTS

Inez Sales and Debra M. Miller.

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ARGUMENT 2

THE FOURTH CIRCUIT'S APPLICATION OF WAIVER WILL DENY THE PETITIONERS IMPORTANT FIRST AMENDMENT RIGHTS.

ARGUMENT 3

THE FOURTH CIRCUIT'S APPLICATION OF WAIVER CONFLICTS WITH THE FOURTH CIRCUIT'S OWN PRECEDENT, IS IN CONFLICT AS WELL WITH DECISIONS FROM OTHER CIRCUITS AND FAILS TO FIT THE REASONS FOR WHICH THE WAIVER DOCTRINE IS OSTENSIBLY CREATED.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit subject of this Petition is reported at 224 F.3d 293 (4th Cir. 2000). A copy of the Opinion is included in the Appendix as Appendix A at 1a. The first opinion of the United States Court of Appeals for the Fourth Circuit in this case is reported at 158 F.3d 768 (4th Cir. 1998), a copy of which opinion is included as Appendix C at 20a. The rulings of the District Court for the Western District of Virginia are not published but are set forth in this Petition as Appendix D at 49a and as Appendix E at 54a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its Opinion on August 16, 2000. On August 30, 2000 Petitioners filed a Petition for Rehearing and Petition for Rehearing *En Banc* which the United States Court of Appeals denied on November 29, 2000 (Appendix B at 18a). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

* * * * *

U.S. Const., amend. XIV, section 1.

...No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall anys state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*****

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A.
The Case in the District Court before Sales I

Respondents Miller and Sales were two assistant registrars for Lynchburg, Virginia. The newly appointed general registrar Carol Read did not reappoint them. The non-reappointed assistant registrars made no claim that the newly appointed general registrar violated their civil rights. Rather, the two assistant registrars claimed that two members of the Electoral Board, Grant and Mason, the Petitioners, neither of whom had any power to appoint assistant registrars, caused the newly appointed general registrar to not reappoint the assistant registrars because the incumbent assistant registrars were Democrats. These events occurred in 1995.

The District Court had jurisdiction over this action under 28 U.S.C. §1331 and §1343. The complaint alleged that the plaintiffs, the Respondents herein, were denied rights under the First and Fourteenth Amendments to the United States Constitution and the suit was brought under 42 U.S.C. §1983.

The District Court decided that the only type of evidence that could support the assistant registrars' allegations in the suit was direct coercive influence over the newly appointed general registrar, evidence that the Petitioners' forced the new general registrar (against her will) to not reappoint the assistant registrars.

At trial the District Court decided that the plaintiff assistant registrars were unable to muster the evidence necessary to take this claim of coercion to a jury and granted a judgment to the Petitioners under FRCP 50(a). The district judge determined there was "no legally sufficient evidentiary

basis for a reasonable jury to find for" the plaintiffs on the claims they were making against the defendant electoral board members, the Petitioners here.

The District Court Judge made it clear throughout the trial that the plaintiffs had no case if their claim was that the electoral board members (without appointing authority) and not the general registrar (with appointing authority) were the persons who had acted with allegedly improper political motivations.

B.
SALES I,
THE FIRST APPEAL

The Fourth Circuit in *Sales v. Grant*, 158 F.3d 768 (4th Cir. 1998) (Sales I) changed the "political hirings and firings" law as it had been forged in *Elrod-Rutan*.[1] A totally new and vast set of potential defendants was added to the stage. The political hirings and firings law since *Elrod* had been aimed at the persons with the authority to make the hirings and firings decisions. Sales I changed the law to include persons who have no authority to hire or fire. Under Sales I anyone who with political motivations sets into motion a series of acts by others which they knew or should have known would cause the person with the power to appoint (the general registrar in this case) to fail to reappoint another person for a public job is liable to the non-reappointed person even when there is no allegation against the person with the power to appoint that that person acted improperly. *Sales*, 158 F.3d at 776.

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1 See *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980) and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

This addition to the *Elrod-Rutan* framework of analysis makes everyone who endorses, actively supports or simply recommends a person for a public job---especially those in the same department or agency---open to suit by those who did not get or who lose the job, and there is no need to sue the person who had the authority to hire or fire. Such an expansion of *Elrod-Rutan* is unwarranted, not supported by precedent and is frankly a dangerous intrusion upon free speech.

After setting out this dramatically new component of political hirings and firings law, the panel in Sales I concluded that the District Court was incorrect to conclude that the jury had no legally sufficient evidentiary basis upon which to make a finding. *Sales*, 153 F.3d at 777. The Fourth Circuit panel reversed the District Court and remanded for a new trial.

C.
CLAIM OF QUALIFIED IMMUNITY RAISED PRIOR TO NEW TRIAL

Approaching a new trial the Petitioners were faced with defending a case where the law of the case was plainly and unequivocally not clearly established constitutional law. The "set into motion a series of acts" expansion of the *Elrod-Rutan* political hirings and firings law was way outside the developed legal landscape present in 1994 and 1995. *Wilson v. Lane*, 141 F.3d 111, 117-18 (4th Cir. 1998). Mason and Grant knew they were entitled to immunity from trial unless pre-existing law dictated, that is, truly compelled (not just suggested or allowed or raised a question about) that their actions in 1994 and 1995 violated clearly established constitutional law. *Jean v. Collins*, 155 F.3d 701, 708-09 (4th Cir. 1998).

The law of the case had changed from immediate, direct, hands-on conduct by the appointing authority to a remote and indirect setting into motion of a series of acts by others which those not having the responsibility for hiring and firing should have reason to believe will cause a decision-maker in the future to make an improperly politically motivated appointment decision. The political hirings and firings law of the case established in Sales I casts the net of *Elrod-Rutan* liability much wider and the Petitioners suggest impermissibly wider than the *Elrod-Rutan* precedent permits.

It is in this context that Petitioners 30 days prior to the case going to trial for a second time articulated and briefed their defense of qualified immunity, raised in their Answers to the suit, in a Motion for Summary Judgment and a Memorandum in Support of Motion for Summary Judgment. The Petitioners asked the District Court to honor their entitlement to avoid, to be immune from, the second trial because the law of the case to be prosecuted against them in the second trial was not clearly established at the time they were alleged to have acted unconstitutionally.

The Respondents filed a Motion and Memorandum to Quash or Strike Defendants' Motion for Summary Judgment.

The District Court though registering a concern about waiver, nevertheless directly and squarely addressed and overruled on the merits the qualified immunity defense raised by the petitioners. The District Court stated on page 3 of its Memorandum Opinion of May 17, 1999

> "The defendants argue, at least with regard to the Motion for Summary Judgment based on a theory of qualified immunity, that they could not

> have raised this issue before because the very opinion issued by the Fourth Circuit in this case changed the scope of what behavior constitutes causation for a claim of politically motivated discharge, and therefore changes what the perimeters of what the defendants should have known to be unconstitutional for purposes of a qualified immunity defense. I disagree. ..." (App. D at 52a).

The Petitioners promptly filed an Interlocutory Appeal under "the Collateral-Order" Doctrine on August 30, 2000. *DeMeglio v. Haines*, 45 F.3d 790, 807-08 (4th Cir. 1995). The Respondents asked the District Court to rule the appeal frivolous which it did, ruling nevertheless that the qualified immunity defense raised by the Petitioners was not without merit. Stated the Court, "while I disagree with the defendants' position regarding qualified immunity..., I do not find the appeal frivolous on the merits." Additionally, the district court stated that "I agree with the plaintiffs that the defendants may raise these motions [qualified immunity and eleventh amendment immunity] with the Court post-trial. And the defendants will be free to appeal decisions rendered at that time, subsequent to the conclusion of the jury trial." (App. E at 54a).

The Fourth Circuit determined the appeal was not frivolous and took jurisdiction under 28 U.S.C. §1291.

D.
SALES II
THE SECOND APPEAL

A divided panel in the case now before you, *Sales v. Grant*, 224 F.3d 293 (4th Cir. 2000), hereinafter Sales II, decided on August 16, 2000 that the defense of qualified

immunity was forever waived because it had not been pursued "prior to remand after Sales I." *Sales*, 224 F.3d at 296-97. Petitioners filed a Petition for Rehearing and Petition for Rehearing *En Banc* on August 30, 2000 which was denied by the Fourth Circuit on the 29th day of November, 2000. Three members of the Fourth Circuit voted in favor of the Rehearing *En Banc* and 7 voted against. (App. B at 18a). This Petition for Writ of Certiorari follows.

ARGUMENT FOR GRANTING WRIT

ARGUMENT 1

THERE IS NO RULE OR PRECEDENT TO SUPPORT THE FOURTH CIRCUIT'S APPLICATION OF WAIVER TO DENY THE PETITIONERS ENTITLEMENT TO QUALIFIED IMMUNITY WHERE THE FOURTH CIRCUIT ITSELF CHANGED THE FACTORS RELEVANT TO THE DETERMINATION OF QUALIFIED IMMUNITY.

Petitioners Mason and Grant raised their entitlement to qualified immunity prior to the trial where the Fourth Circuit Sales I law of the case would certainly be applied. That law of the case is set forth at page 776 of Sales I (App. C at 33a).

> Critically for this case, the §1983 causation language, '[subject] or [cause] to be subjected,' imposes liability not only for conduct that directly violates a right but for conduct that is the effective cause of another's direct infliction of the constitutional injury.

As the First Circuit has put it:

> "The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury."
>
> *Guiterrez-Rodriguez v. Cartagena*, 882 F.2d 553, 560-561 (1st Cir. 1989)...

This law of the case was not and these "governing substantive principals," to quote Sales I at page 776 were not prior to Sales I, the established law in the *Elrod-Rutan* line of First Amendment cases. This "effective causation by indirect means" addition to the *Elrod-Rutan* canon of First Amendment cases is first articulated in the Fourth Circuit by the Fourth Circuit in Sales I.

The "legally relevant factors" to a determination of the issue of Petitioners' qualified immunity, *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996) were radically altered by Sales I. No case before Sales 1 extended the *Elrod-Rutan* political hirings and firings precedent to persons who did not do the appointing. No case before Sales 1 set out what members of the electoral board (or similarly appointed political bodies) could or could not do in the way of speech and association---partisan or otherwise---to make known to a newly appointed general registrar the desires of the electoral board members as to how the general registrar's office should be run and with whom. No case before Sales 1 had explained "what type or amount of evidence would be constitutionally sufficient to establish" the

constitutional deprivation claimed by the plaintiffs in a case where defendants were not the direct hiring/firing/appointing authority. (*Cf. Gooden v. Howard County, Md.*, 954 F.2d 960, 968 (4th Cir. 1992)).

The Fourth Circuit erroneously failed to acknowledge or even address whether Sales I had changed the legal landscape of the *Elrod-Rutan* First Amendment line of cases. Had the Fourth Circuit addressed this threshold inquiry, it would have been compelled to hold that the *Elrod-Rutan* legal landscape had changed, that new "legally relevant factors" to a qualified immunity claim had arisen and that pursuing the qualified immunity claim prior to the second trial was both necessary and timely.

The Fourth Circuit erroneously neglected to make the threshold inquiry it was called upon by *Behrens*, 516 U.S. at 309 and *Mitchell v. Forsyth*, 472 U.S. 511, 524-26 (1985) to make.[2]

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2 *Behrens v. Pelletier* suggests that at each stage of litigation "the legally relevant factors bearing upon the *Harlow* [*Harlow v. Fitzgerald*, 457 U.S. 800 (1982)] question will be different..." *Behrens*, 516 U.S. at 309 and *Mitchell v. Forsyth*, councils both that qualified immunity just like absolute immunity "is an *immunity from suit* rather than a mere defense to liability..." *Id.* at 526. and that public officials have "an entitlement not to stand trial" where the conduct of which the plaintiffs complain does not violate clearly established law. *Mitchell*, 472 U.S. at 526.

Suarez Corp. Industries v. McGraw, 125 F.3d 222 (4th Cir. 1997), the case the panel majority cites in Sales II, suggests the same conclusion. For even though the Fourth Circuit in *Suarez* decided qualified immunity had been waived at the Motion to Dismiss stage (not having been asserted or raised in the lower court below), it stated the waiver only applied to the current stage of the case. *Suarez*, 125 F.3d at 227. See also the case in this regard cited by Judge Widener in his dissent to Sales II, namely *Kennedy v. City of Cleveland*, 797 F.2d 297, 303-04 (6th Cir. 1986) where qualified immunity was allowed to be raised at trial even though it had been earlier waived because it had not been included in prior pre-trial dispositive motions.

Simply stated, the Fourth Circuit so dramatically changed the rules of the game that it must not be permitted to deny the Petitioners their entitlement to not be tried under the new rules.

ARGUMENT 2

THE FOURTH CIRCUIT'S APPLICATION OF WAIVER WILL DENY THE PETITIONERS IMPORTANT FIRST AMENDMENT RIGHTS.

In the legal precedent established by the cases from *Elrod-Rutan* this Court acknowledges the right to speak out politically but condemns turning political speech into the act of denying someone a job or a promotion because that person does not share the same political beliefs. The focus is always on the act of discharge, termination, promotion, demotion and the defendant is always the person or entity who or which actually makes the employment decision. The inquiry is not whether the employment decision maker is committing a tort against the

employee/appointee but whether the employment decision maker (the appointer) is violating the First Amendment rights of the employees/appointees. And the purpose of the exercise is to preserve the rights of the employees/appointees to speak out politically themselves. It is not the intent of the *Elrod-Rutan* precedent (especially as it was articulated in *Elrod*) to significantly or substantially diminish the rights of the employer/appointer to speak out and even speak out strongly about public matters, even in a partisan way.

We must keep in mind that *Elrod* was a balancing of First Amendment free speech rights which tilted the balance toward the free speech rights of an appointee when the appointer was converting his or her free speech rights into an act of job denial. *Elrod v. Burns*, 427 U.S. 347, 371-372 (1976). The Court itself in *Elrod* struck the balance that one person could not convert his political beliefs into the act of denying a person a job because of the other person's political beliefs. But there was no attempt in *Elrod* to restrain core public or partisan speech outside the immediate arena of the appointer and the appointee. In Sales 1 the Fourth Circuit not only shifts the focus away from the immediate arena of the appointer and the appointee but leaves to the public official the burden of deciding which word or act may set into motion a series of acts by others which he knows or should know would cause an appointing authority to act in a constitutionally impermissible way.

By splicing onto the traditional *Elrod-Rutan* precedent both the general principle of indirect cause and the further principle that that cause can be defined and demonstrated through a series of acts by others which the actor should know would cause the others to inflict the constitutional injury the Fourth Circuit has shifted the focus of the inquiry from the acts and motivations of the employer/appointer (usually one in

number) to the motivations and speech of those (who could be many) who attempt to influence the employer/appointer. Petitioners Grant and Mason submit that this shift in focus permits and encourages a dangerous intrusion into the First Amendment speech and association rights held by Petitioners Grant and Mason (and those similarly situated), an intrusion which is the antithesis of the balancing of First Amendment rights which the precedent of *Elrod-Rutan* attempts to maintain. The fear of being caught up in the web of events that the not-rehired employee could later charge to be unconstitutional political influence or persuasion, will, the Petitioners submit, chill the Petitioners' (and those similarly situated) clear First Amendment rights to politically speak out on matters of public concern.

Rather than acknowledging this major change in the balancing of *Elrod-Rutan* First Amendment rights brought about by its decision in Sales I and therefore acknowledging the Petitioners' right to claim qualified immunity as to this dramatic change in the constitutional landscape, the Fourth Circuit erroneously chose instead to sidestep the issue of qualified immunity through the administrative expedient of waiver.

ARGUMENT 3

THE FOURTH CIRCUIT'S APPLICATION OF WAIVER CONFLICTS WITH THE FOURTH CIRCUIT'S OWN PRECEDENT, IS IN CONFLICT AS WELL WITH DECISIONS FROM OTHER CIRCUITS AND FAILS TO FIT THE REASONS FOR WHICH THE WAIVER DOCTRINE IS OBSTENSIBLY CREATED.

Sales II holds that the Petitioners forever waived their claim of qualified immunity and may not raise it before, at or

after the second trial because they did not articulate that claim beyond raising it in their Answer at the first trial or in the first appeal (Sales I).

Judge Widener is correct in his dissent in Sales II:

> "I submit that a defendant who moves for, and is granted, summary judgment based on one ground, in no way waives his other affirmative defenses that have been pleaded, and these defenses are available in the event the case is remanded for a new trial, as here. Sales II (App. A at 14a).

The doctrine of waiver applied by the Fourth Circuit in Sales II is without legal support. The majority opinion in Sales II admits that the Fourth Circuit had not previously addressed the question of waiver of qualified immunity "under the exact factual circumstances present here." *Sales*, 224 F.3d at 296. Moreover, the use of waiver to deny a claim of qualified immunity under these circumstances appears to be a matter of first impression for the United States Supreme Court.

The majority of the panel in Sales II relies on *Suarez Corp. Industries v. McGraw*, 125 F.3d 222 (4th Cir. 1997) . The reliance is misplaced. Qualified immunity was never alleged nor addressed at any point in any manner by the trial court in *Suarez* and was raised and asserted for the first time in the case only on the first appeal. And even then, the Fourth Circuit concluded that the waiver only applied to "this stage" of the litigation. *Suarez*, 125 F.3d at 226.

Furthermore, the four cases cited by *Suarez* in support of the *Suarez* decision do not at all support the far reaching and draconian version of waiver applied by the majority in Sales II.

G. Heileman Brewing v. Stroh Brewery, 843 F.2d 169 (4th Cir. 1988) involved a new defense "first raised on appeal..." There had been no mention of the defense in the lower court at all. *Suarez* also cites *Buffington v. Baltimore Co., MD.*, 913 F.2d 113, 120-22 (4th Cir. 1990), cert. denied, 499 U.S. 906 (1991) wherein at the time of the first appeal qualified immunity had not even been raised in the answer and by the time of the second appeal, qualified immunity, the Fourth Circuit determined, had not been effectively raised in the appeal. *Suarez* cites the Eleventh Circuit opinion of *Caban-Wheeler v. Elsea*, 71 F.3d 837, 842 (11th Cir. 1996) where the Eleventh Circuit determined that the defendants had waived qualified immunity where the defense was raised for the first time in the second appeal after not having been raised at the first bench trial nor after the first appeal, nor at the second jury trial or a third bench trial. *Berryman v. Regiler*, 47 F.3d 1167, 1995 WL 31575 (6th Cir. 1995)(unpublished disposition) is the fourth case cited by *Suarez* and is a case in which the Sixth Circuit decided that the defendants could not raise the defense of qualified immunity during the first appeal as it had not been raised in the 12(b)(6) motion or the Rule 56 summary judgment motion prior to the appeal but "if properly raised on remand, the district court will have ample opportunity to address defendants' qualified immunity defense." *Berryman*, 1995 WL 31575 at *5.

As pointed out by Judge Widener in his panel dissent, the majority Sales II panel opinion also conflicts with decisions of the Second and the D.C. Circuit.

In the Second Circuit an affirmative defense is sufficiently raised and is not waived so long as the defense is set out in the defendants' answer as was done by both Petitioners in this case. In *Santos v. District Council of New York City-etc.*, 619 F.2d 963 (2nd Cir. 1980) the affirmative defense of statute

of limitations[3] was not raised until after the case had gone through one appeal and was on remand; then its assertion was only by placing it in the answer. *Santos*, 619 F.2d at 966.

And of like import is the case of *Kulzer v. Pittsburgh-Corning Corp.*, 942 F.2d 122, 125 (2nd Cir. 1991) where the Court states

> "The assertion of a limitations defense in the answer preserved [the defendants'] right to raise the defense both during the first trial and before the second. ..."

The D.C. Circuit Court of Appeals case of *Daingerfield Island Protective Soc. v. Babbitt*, 40 F.3d 442 (DC Cir. 1994) is in substance indistinguishable from the case before the Court. *Daingerfield* was an environmental group suing the Park Service. Of the many claims involved, there was a challenge to an exchange agreement. The Park Service won at the initial district court stage of the litigation when the district court granted summary judgment. The environmental group appealed and the D.C. Circuit reversed the district court and remanded for further consideration of the issues. After appeal and on remand the district court again granted summary judgment but this time granted summary judgment as to the challenge to the exchange agreement based on a statute of limitations set out in the Tucker Act. 28 U.S.C.§2401. Then in a second appeal the environmental group argued that the Park Service had

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3 A defense of qualified immunity is certainly no less eligible than a defense of the statute of limitations for preservation by merely being raised in the Answer. Petitioners submit the defense of qualified immunity is indeed "no mere defense to liability" but is a member of that small class of rights---an entitlement---"too important to be denied review..." *Mitchell*, 472 U.S. at 524-25.

"abandoned its limitations defense by failing to assert it before the first appeal." *Daingerfield* at 445. But the DC Circuit ruled

> "Under the usual rule, an affirmative defense is deemed waived if it 'has not been raised in a pleading, by motion, or at trial.' ... As we have already noted, the government adequately raised the limitations defense in its answer---it was not required to reassert the defense in its subsequent successful summary judgment motion." Id at 445. *(emphasis added)*

Cases from the First and from the Seventh Circuit as well as the other cases about waiver set forth in this Petition demonstrate that the majority panel ruling in Sales II on waiver veers far afield from the central purposes allegedly to be served by the court made doctrine of waiver. The problem for the court in the First Circuit case of *Guzman-Rivera v. Rivera Cruz*, 98 F.3d 664, 670 (1st Cir. 1996) was not that the qualified immunity defense had been raised for the first time on the eve of the *third* trial (and second appeal) but that according to the Court the defendants had pursued a strategy of delay which had prejudiced the plaintiffs and abused the judicial process. And the Seventh Circuit in *Rakovich v. Wade*, 850 F.2d 1180, 1204 & fn. 16 (7th Cir. 1988) suggested that the purpose of the court made waiver doctrine was to ensure that the defense of qualified immunity be brought to the attention of the trial court at some stage of the litigation before the trial court and not raised for the first time in the appellate court on a second appeal. In the case presently before the Court there is no showing that the Petitioners had pursued a strategy of delay which has prejudiced the Respondents, that they have abused the judicial process or that prior to the second trial the defense of qualified immunity was not brought to the attention of and addressed by the trial court.

As discussed above the Petitioners requested their entitlement for immunity from the second trial at a time and in a manner which gave the Respondents and the district court ample time and opportunity to address the qualified immunity defense. There was no Pre-Trial Order, Rule of Court or previous Western District of Virginia or Fourth Circuit case which mandated that the affirmative defense of qualified immunity be articulated and briefed (anymore than by raising it in the answer pursuant to Federal Rule of Civil Procedure 8(c)) sooner---in the circumstances here---than it was. And the Respondents and district court judge had the opportunity to and did squarely address the qualified immunity defense that the Petitioners had raised.

CONCLUSION

In conclusion, it was error to conclude that the Petitioners had forever waived their defense of qualified immunity where (1) that defense had been raised by their Answer, (2) the Respondents' *Elrod-Rutan* non-reappointment claim had been dismissed under Rule 50(a) at the District Court, (3) where the Circuit Court reversed the District Court but in doing so expanded the situations (dramatically changed the legal landscape-the legally relevant factors) where the *Elrod-Rutan* hiring and firings First Amendment law would apply and (4) where the Petitioners raised and briefed qualified immunity prior to a second trial, a second trial where the newly expanded *Elrod-Rutan* hiring and firings First Amendment law would for the first time in the Fourth Circuit be applied.

The Petitioners Grant and Mason respectfully request a Writ of Certiorari be issued to review that portion of Sales II which holds that the Petitioners have forever waived asserting

their claim of qualified immunity, to reverse that holding of the Fourth Circuit and rule that the Petitioners are entitled to qualified immunity, dismissing the case against them or in the alternative, to remand the case to the Fourth Circuit with instructions that it address and rule on the claim of qualified immunity in light of the legally relevant factors significantly altered by Sales I.

The Fourth Circuit established new law that will be applied in the second trial. It is horribly unfair for the Fourth Circuit to violate its own precedent and use waiver to deny the Petitioners qualified immunity to the new legal landscape, it, the Fourth Circuit created. This Court must prevent this result, this abuse of the doctrine of waiver if indeed such a doctrine does, in these circumstances, apply to the entitlement of qualified immunity, which the Petitioners submit, it should not.

ALPHONSO L. GRANT AND JOHN E. MASON
-BY COUNSEL-

Keuling-Stout, P.C.
125 Clinton Avenue, East
P.O. Box 400
Big Stone Gap, Va 24219
(540) 523-1676
(540) 523-1608 (fax)
Va. State Bar No. 15289

BY: _____

Henry S. Keuling-Stout
Attorney for Petitioners

APPENDIX A

Sales v. Grant, 224 F.3d 293 (4th Cir. 2000)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INEZ SALES; DEBRA M. MILLER, Plaintiffs-Appellees,
v.
ALPHONSO L. GRANT, in his individual capacity
and in his official capacity as a member of the
City of Lynchburg Electoral Board;
JOHN E. MASON, JR., in his individual capacity,
Defendants-Appellants,
and
DAVID T. PETTY, JR., in his official capacity
as member of the City of Lynchburg Electoral Board;
CITY OF LYNCHBURG ELECTORAL BOARD;
CAROL SPENCER READ; ARELIA LANGHORNE,
in her official capacity as a member of the
City of Lynchburg Electoral Board;
JOHN COBB, in his official capacity
as a member of the City of Lynchburg Electoral Board;
ANNE MARIE MIDDLESWORTH, in her official capacity
as general registrar of the City of Lynchburg,
Defendants.

No. 99-1650

Argued: May 4, 2000
Decided: August 16, 2000

Appeal from the United States District Court for the Western District of Virginia, at Lynchburg. Jackson L. Kiser, Senior District Judge. (CA-96-27-L)

Before WIDENER, LUTTIG, and WILLIAMS, Circuit Judges.

Affirmed in part, motion to dismiss granted in part and denied in part, and remanded by published opinion. Judge Luttig wrote the opinion in which Judge Williams concurred. Judge Widener wrote an opinion concurring in part and dissenting in part.

COUNSEL

ARGUED: Henry Smith Keuling-Stout, KEULING-STOUT, P.C., Big Stone Gap, Virginia, for Appellants. David Edward Constine, III, MAYS & VALENTINE, L.L.P., Richmond, Virginia, for Appellees. ON BRIEF: Anthony F. Troy, Kimberly W. Daniel, MAYS & VALENTINE, L.L.P., Richmond, Virginia, for Appellees.

[F.3d 295] OPINION

LUTTIG, Circuit Judge:

Defendants John Mason and Alphonso Grant, members of the Electoral Board of the City of Lynchburg, Virginia, appeal from the district court's quashing of their motions for summary judgment. In those motions, the defendants asserted qualified and sovereign immunity from suit for allegedly causing plaintiffs Inez Sales and Debra Miller, former Lynchburg Assistant Registrars, not to be reappointed. Sales and Miller have moved to dismiss this appeal, arguing that the appellants have waived their right to assert either immunity. For the reasons that follow, we grant the motion to dismiss in part, deny that motion in part, affirm in part, and remand for further proceedings.

I.

After they were not reappointed as Assistant Registrars for the City of Lynchburg, Sales and Miller filed an action, under 42 U.S.C. § 1983, alleging that Electoral Board members Mason and Grant violated their constitutional rights by causing them not to be reappointed because of their political affiliations.[1] Although the General Registrar, rather than the Electoral Board or its members, possesses the power to hire Assistant Registrars under Virginia law, see Va. Code § 24.2-112, Sales and Miller claim that Mason and Grant improperly used their influence over the General Registrar to control her appointment decision.

Mason and Grant responded to the complaint by filing a motion to dismiss, which did not mention qualified or sovereign immunity, and which was denied. They then filed separate answers to the complaint, in which each defendant listed qualified immunity, but not sovereign immunity, among their affirmative defenses. Mason and Grant next moved for summary judgment, in which motion they failed to assert either qualified or sovereign immunity. The district court did not rule on the motion, and a four-day trial ensued, during which Mason and Grant never once asserted either claim of immunity. After both the plaintiffs and the defendants had presented their evidence, Mason and Grant moved for dismissal under Federal Rule of Civil Procedure 50, on grounds unrelated to qualified or sovereign immunity, and the district court granted that motion.

This court reversed and remanded for a new trial in *Sales v. Grant*, 158 F.3d 768 (4th Cir. 1998) ("*Sales I*"). During the course of Sales I, Mason and Grant never asserted either qualified or sovereign immunity. On remand, Mason and Grant moved for summary judgment, asserting that they were immune from suit under the doctrines of qualified and sovereign immunity. The district court quashed these motions, explaining that this court had remanded the case for a new trial, and that it was "inappropriate for the defendants to raise the defenses of qualified immunity and Eleventh

Amendment immunity at this late date." J.A. 311.

Mason and Grant now appeal from the quashing of their motions for summary judgment. Sales and Miller have moved to dismiss this appeal, arguing that Mason and Grant have waived their right to assert both qualified and sovereign immunity. [F.3d 296]

II.

Mason and Grant first claim that they are entitled to qualified immunity from the suit brought by Sales and Miller. Sales and Miller argue in their motion to dismiss that Mason and Grant have waived their right to assert this affirmative defense by failing to pursue it prior to remand after Sales I. We agree, and therefore grant the motion to dismiss with respect to Mason and Grant's assertion of qualified immunity.

It is well-settled that qualified immunity is an affirmative defense, and that "the burden of pleading it rests with the defendant." *Crawford-El v. Britton*, 523 U.S. 574, 586-67 (1998) (quoting *Gomez v. Toledo*, 446 U.S. 635, 639-641 (1980)). Although Mason and Grant technically pled their qualified immunity defense in their answers to the initial complaint, they never explained the legal or factual basis for their claim of qualified immunity prior to remand after Sales I. Indeed, their mention of qualified immunity in their answers consisted of only a single, cursory sentence on the matter, contained in a listing of several affirmative defenses: "The individual defendants are protected by qualified immunity from suit." *Answer of Defendant Grant* at 4; *Answer of Defendant Mason* at 4. And, as recounted above, although the defendants had numerous other opportunities prior to remand to assert their claim of qualified immunity, they failed to do so. Specifically, Mason and Grant omitted any mention of qualified immunity from their pre-trial motions to dismiss and for summary judgment, from the

presentation of their case during a four-day trial, and from their post-trial motion for dismissal. As such, prior to remand after Sales I, the notion that qualified immunity might play a role in Mason and Grant's defense was mentioned to the district court only once, and, even on that occasion, the defendants failed to provide any explanation as to how or why qualified immunity might apply. Under these circumstances, we have no trouble concluding that the defendants waived their right to press seriously their claim of qualified immunity for the first time after remand.

Although this court has not addressed the question whether a claim of qualified immunity is waived under the exact factual circumstances present here, our conclusion finds support in this court's decision in *Suarez Corp. Industries v. McGraw*, 125 F.3d 222 (4th Cir. 1997), in which we held that a claim of qualified immunity can be waived if not squarely presented to the district court, and that qualified immunity cannot be asserted for the first time on appeal. *Id.* at 226. As in *Suarez*, the defendants here never pressed their claim of qualified immunity prior to appeal, and we have no doubt that the result in *Suarez* would have been the same had the defendants there cursorily mentioned qualified immunity in their initial answer. It is thus clear that, under *Suarez*, Mason and Grant could not permissibly have asserted qualified immunity on appeal in *Sales I.* To allow Mason and Grant seriously to pursue their qualified immunity claim for the first time on remand after *Sales I* would be to forgive their waiver of that defense on the mere fortuity that this court chose to remand the case after the first appeal. This we decline to do.

In concluding that Mason and Grant have waived their right to assert qualified immunity, we do not hold categorically that a section 1983 defendant must pursue the defense of qualified immunity on every occasion possible in order to preserve his right to raise that defense later in the proceedings. Rather, we hold only that where, as here, a

defendant only cursorily references qualified immunity in his answer to a section 1983 complaint, and thereafter fails to mention, let alone seriously press, his assertion of that affirmative defense, despite filing several dispositive motions in the district court and despite participating in a trial on the merits of the section 1983 claim, that defendant [F.3d 297] may not actively pursue his claim of qualified immunity for the first time on remand after appeal.

III.

Mason and Grant next argue that they are entitled to Eleventh Amendment immunity from the suit for monetary damages brought by Sales and Miller. Because Sales and Miller seek an award of damages against Mason and Grant in only their individual capacities, we conclude that Mason and Grant are not entitled to protection from suit under the Eleventh Amendment.[2]

In asserting sovereign immunity from the imposition of monetary liability against them in their individual capacities, Mason and Grant do not challenge the well-established rule that the Eleventh Amendment generally does not bar suits for damages against state officers, so long as those officers are sued in their individual capacities. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). Rather, Mason and Grant contend that because, under Virginia law, any monetary judgment against them would be paid out of a state-funded insurance plan, *see* Va. Code § 2.1-526.8, by a check drawn on the state's general treasury, the suit is barred by the Eleventh Amendment. We disagree.

Mason and Grant's argument amounts to an assertion that a state may convert any or all individual capacity suits, to which the protections of sovereign immunity would otherwise be inapplicable, into official capacity suits, with all the attendant protections of the Eleventh Amendment, by announcing (via statute or otherwise) that it will indemnify

governmental officers sued in their individual capacities and by creating an insurance plan to finance that indemnification. As Sales and Miller point out, and Mason and Grant themselves recognize, see Appellants' Reply Br. at 15, the courts of appeal have decisively rejected this argument. *See, e.g., Jackson v. Georgia Dep't of Transp.*, 16 F.3d 1573, 1577-78 (11th Cir. 1994) ("We conclude that the existence of a voluntarily established liability trust fund does not make the state the real party in interest in this action and that the trust fund does not extend the state's Eleventh Amendment immunity to its employees sued in their individual capacity."); *Benning v. Board of Regents of Regency Univs.*, 928 F.2d 775, 778-79 (7th Cir. 1991) ("[T]he state cannot manufacture immunity for its employees simply by volunteering to indemnify them. . . . [A] state's decision to indemnify its employees does not transform a suit against individual defendants into a suit against the sovereign."); *Griess v. Colorado*, 841 F.2d 1042, 1046 (10th Cir. 1988) ("[T]he state's position boils down to an [F.3d 298] attempt unilaterally to extend its sovereign immunity to all of its employees by the assumption of an illusory obligation for indemnification. . . . The state's constitutional immunity cannot be artificially manipulated in this fashion."); *Spruytte v. Walters*, 753 F.2d 498, 512 & n.6 (6th Cir. 1985) ("A government may not manufacture immunity for its employees by agreeing to indemnify them."); *Demery v. Kupperman*, 735 F.2d 1139, 1146-49 (9th Cir. 1984).[3]

In *Beardsley v. Webb*, 30 F.3d 524 (4th Cir. 1994), this court agreed that a state's promise of indemnification cannot invest governmental officers, sued in their individual capacities, with sovereign immunity that they would not otherwise enjoy. *See id.* at 531. Although we noted in *Beardsley* that the defendant there had not established that the insurance plan that would indemnify him was state-funded, see *id.* at 531-32, we do not believe that the fact that such has been established here warrants a conclusion different from that reached in *Beardsley*. To rule otherwise

would be to permit a state to eviscerate completely the rule that governmental officers are not immune from monetary liability when sued in their individual capacities. And this evisceration would come at no cost to the states, for, under the rule proposed by Mason and Grant, once a state promised to indemnify officers sued in their individual capacities, the "insurance fund" established to finance the promised indemnification would not have to contain any funds at all, given that all suits in federal court against state officers would be prohibited absent consent by the state.

In concluding that a promise of indemnification does not alter the non-immune status of state officers sued in their individual capacities, we derive support from the Supreme Court's decision in *Regents of the University of California v. Doe*, 519 U.S. 425 (1997), in which a unanimous Court held that the fact that the federal government would indemnify a state university for litigation costs and for any adverse judgment did not alter the Eleventh Amendment immunity enjoyed by the university. *Id.* at 431. In so holding, the Court rejected the notion that the question whether an entity was protected by the Eleventh Amendment should be converted "into a formalistic question of ultimate financial liability," and made it clear that none of the reasoning in its precedents "lends support to the notion that the presence or absence of a third party's undertaking to indemnify the agency should determine whether it is the kind of entity that should be treated as an arm of the State." *Id.* at 430-31. The Court thus concluded that "it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant" to the Eleventh Amendment inquiry. We are confident that, were the Court confronted with a case, such as the one now before us, in which defendants sued in their individual capacities asserted sovereign immunity based on a state's promise of indemnification, the Court would decline to allow that promise to invest the defendants with immunity that they would not otherwise enjoy, just as it declined to

allow the mechanism of indemnification to divest an entity of immunity that it otherwise enjoyed in *Regents*.

We therefore conclude that Mason and Grant are not protected by the Eleventh Amendment from the suit for monetary damages that Sales and Grant have filed against them in their individual capacities.[4] [F.3d 299]

CONCLUSION

For the reasons stated herein, we grant the appellees' motion to dismiss the appeal with respect to the appellants' assertion of qualified immunity, deny the motion to dismiss with respect to the appellants' claim of sovereign immunity, and affirm the judgment of the district court with respect to the appellants' assertion of sovereign immunity. We also remand the case for further proceedings consistent with this opinion and the opinion of this court in *Sales I.*

It is so ordered.

FOOTNOTES

[1] The appellees filed suit against Mason and Grant in both their individual capacities and in their official capacities as members of the Electoral Board. Grant remains a defendant in both capacities, but, by order of the district court, Mason is now a defendant in only his individual capacity, because he is no longer a member of the Electoral Board.

The section 1983 complaint also named a third member of the Electoral Board, the General Registrar, and the Electoral Board itself as defendants. However, Mason and Grant were the only parties to file the summary judgment motions that are the subject of this appeal or to file a notice of appeal from the quashing of those motions, and are thus the only defendants-appellants now before this court.

[2] As noted above, while Mason is presently a defendant in this action in only his individual capacity, Grant remains a defendant in both his individual and official capacities. We understand Grant (along with Mason) to have asserted Eleventh Amendment immunity only as to the monetary relief sought against him in his individual capacity. The only reference to the official capacity portion of the lawsuit in the portions of Mason and Grant's briefs that discuss sovereign immunity is to the principle that, as state officers, they cannot be personally obligated to pay monetary judgments entered against them in their official capacities. *See* Appellants' Br. at 28. Sales and Miller do not contest this point, and indeed have only sought monetary relief against Mason and Grant in their individual capacities. *See* J.A. 24 (complaint).

The only relief sought by Sales and Miller against Mason and Grant (and at this point, only Grant) in their official capacities is that they (along with the other current members of the Electoral Board) be ordered by the district court to direct General Registrar Read to fill the two Assistant Registrar positions. *See id.* Although there is no apparent reason why sovereign immunity from this request for prospective injunctive relief would be available to Mason and Grant, *see, e.g., Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974), because we do not understand them to have asserted such immunity, we leave it to the district court to address any such assertion of immunity that might be made on remand.

[3] As in the present dispute, in at least three of the cases cited above, the state assumed by statute an obligation to indemnify its employees for awards entered against them in their individual capacities. *See Jackson*, 16 F.3d at 1576 & n.4; *Griess*, 841 F.2d at 1045; *Demery*, 735 F.2d at 1146-47 & n.5.

[4] In rejecting Mason and Grant's claim of Eleventh Amendment immunity on the merits, we necessarily deny Sales and Miller's motion to dismiss this appeal with respect to the Eleventh Amendment claim. However, we express no opinion on the argument, included in the motion to dismiss, that Mason and Grant waived their right to assert sovereign immunity by failing to make that assertion prior to remand after *Sales I.*

WIDENER, Circuit Judge, concurring and dissenting:

I.

I concur in the result *only* of the majority decision as to Eleventh Amendment immunity.*

II.

For some reason not stated in the opinion, the majority expresses "no opinion on the argument, included in the motion to dismiss, that Mason and Grant waived their right to assert sovereign immunity by failing to make that assertion prior to remand after *Sales I.*" Slip p.9, n.4. While the district court, in its opinion of May 17, 1999, similarly avoided the question of waiver, announcing that it "declined to entertain new summary judgment motions by the defendants," in its order of May 25, 1999, certifying the appeal as frivolous, and even considering Eleventh Amendment immunity, it described "the defense giving rise to the appeal has been waived because it should have been raised and decided prior to the first trial in this case." And in that order, indeed, it went on to reason that it agreed with the plaintiffs "that these defendants may raise these motions [Eleventh Amendment and qualified immunity] with the court post-trial" because "this approach would promote judicial efficiency and economy."

The reasons for the treatment of the issue by indirection, both by the district court and the majority, are yet to be explained and, in all events, neither has recognized the decisions of the Supreme Court and our court that Eleventh Amendment immunity may be raised at any time, even on appeal. *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1976); *Ford Co. v. Department of the Treasury*, 323 U.S. 459, 467 (1945); *In Re Collins*, 173 F.3d 924, 927 (4th Cir. 1999).

III.

As to the question of qualified immunity, I respectfully dissent.

The majority depends on *Suarez Corp. Industries v. McGraw*, 125 F.3d 222 (4th Cir. 1997), for the proposition that a claim of qualified immunity can be waived "if not squarely presented" to the district court and that qualified immunity cannot be asserted for the first time on appeal. Suarez did hold that where a claim of qualified immunity had nowhere been mentioned in the case until appeal, it could not be mentioned for the first time on appeal, but it *did not* hold that the reason was that the matter was not "*squarely presented* to the district court" (italics added). It only used the word "squarely" in deciding that the question had *not* been presented. In *Suarez* the defense had not been mentioned until appeal, squarely or otherwise, therefore [F.3d 300] we followed long-time precedent in not permitting qualified immunity, as any other affirmative defense, to be raised for the first time on appeal.

That strained construction of *Suarez* is justified in the majority opinion by describing the defense as only "cursorily mentioned." The emphasis of the majority on what it describes as *cursory* treatment is shown by its dependence on that adjective, or adverb, as the case may be, in three successive paragraphs of its opinion. Slip p.4 and 5.

However, on p.4 of the answers of both of the defendants is the following affirmative defense:

> 51. The individual defendants are protected by qualified immunity from suit.

Cursive, or cursory, as used here, means "delivered in an offhand or casual manner without great attention to detail." *Webster's Third New International Dictionary*, p. 558. I suggest that the defendants could hardly have been more explicit in their defense, and that the adjective used by the majority to denigrate the defense is badly out of place.

IV.

The majority concludes that a party who makes a motion for a Rule 50 judgment as a matter of law and prevails, but ultimately has that decision reversed by an appellate court and remanded for new trial, effectively waives the right to assert a previously pleaded affirmative defense during the new trial. In effect, this holding requires that a defendant moving for a Rule 50 judgment assert all possible defenses in his or her motion, as any remaining defenses will be deemed waived. Even more out of place, the majority decision requires a district court to pass on all the theories asserted even if it considers one of them dispositive, as here. Because the defendants in this case explicitly pleaded qualified immunity in their answer, I would hold that defendants have not waived their right to assert this defense on remand. This is particularly true in view of the district court's order of May 25, 1999 that the defense could be raised after a new trial but not before, which I mention later.

While an affirmative defense such as qualified immunity must be asserted in a responsive pleading, it is "sufficiently raised for purposes of Rule 8 by its bare assertion." *Santos v. District Council of New York City*, 619 F.2d 963, 967 (2d Cir. 1980). See also *Kulzer v. Pittsburgh-Corning Corp.*, 942

F.2d 122, 125 (2d Cir. 1991) (statute of limitations affirmative defense "need not be raised with any rigorous degree of specificity" and bare assertion in answer is sufficient to prevent waiver). Thus, Mason and Grant's answer, pleading the affirmative defense of qualified immunity, entirely satisfied the requirements of Rule 8(c).

Despite the fact that the defendants effectively pleaded qualified immunity as an affirmative defense, the majority holds that the defendants waived their right to assert qualified immunity on remand prior to the retrial because they did not mention qualified immunity, other than in their answers, in subsequent motions to the district court or during the trial in *Sales I*. On the contrary, I submit that a defendant who moves for, and is granted, summary judgment based on one ground, in no way waives his other affirmative defenses that have been pleaded, and these defenses are available in the event the case is remanded for a new trial, as here.

Here, the trial court did not rule on the defendant's summary judgment motion, and took no action disposing of the case until the defendant's Rule 50 motion was made after receiving the evidence at trial. It is beyond dispute that had the trial court initially denied an early summary judgment motion claim of qualified immunity, defendants would have been able to assert qualified immunity either in a subsequent motion or at trial because qualified immunity may be raised at various and successive stages of a dispute. See [F.3d 301] *Behrens v. Pelletier*, 516 U.S. 299, 306-07 (1996). A defendant may first raise a qualified immunity defense at the pleadings stage in a motion to dismiss, and "unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Next, a defendant may move for summary judgment and is entitled to such "if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the

defendant in fact committed those acts." *Mitchell,* 472 U.S. at 526. Finally, "*Mitchell* makes it clear that . . . decisions with respect to dismissal or summary judgment, if adverse, do not preclude the interposition of the defense of immunity as a defense to liability on the merits." *Kennedy v. City of Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986).

The problem addressed in this case has been discussed at length in the decision in Kennedy and in the discussion in *Behrens v. Pelletier*, as follows:

> While *Mitchell* did not say that a defendant could appeal from denial of a qualified-immunity defense more than once,* it clearly contemplated that he could *raise* the defense at successive stages:
>
> > "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." 472 U.S., at 526 (citation omitted).
>
> * Interestingly, however, Mitchell itself dealt with the second of two interlocutory appeals on immunity claims. See 472 U.S., at 515-519. Neither the Court of Appeals nor this Court assigned any significance to the successive aspect of the second appeal.

Thus, *Mitchell* clearly establishes that an order rejecting the defense of qualified immunity at *either* the dismissal stage *or* the summary judgment stage is a "final" judgment subject to

immediate appeal. Since an unsuccessful appeal from a denial of dismissal cannot possibly render the later denial of a motion for summary judgment any *less* "final," it follows that petitioner's appeal falls within § 1291 and dismissal was improper.

Behrens, 516 U.S. 299, 306-07 (1996) (italics in original).

A case on facts indistinguishable, for all practical purposes, from those here is *Daingerfield Island Protective Society v. Babbitt*, 40 F.3d 442 (D.C. Cir. 1994). In *Babbitt*, the court granted summary judgment to the defendant on grounds unrelated to its statute of limitations affirmative defense, which had been pleaded as a defense in defendant's answer. *Babbitt*, 40 F.3d at 444. The D.C. Circuit reversed the initial grant of summary judgment and remanded the case to the district court. On remand, the defendant again moved for summary judgment arguing that the action was barred by the statute of limitations. *Babbitt*, 40 F.3d at 444. This motion was granted, and the plaintiff again appealed, asserting that the defendant had waived its statute of limitations defense. *Babbitt*, 40 F.3d at 444. The D.C. Circuit held that merely pleading the affirmative defense in the answer satisfied Rule 8(c) and that the defendant did not waive its statute of limitations defense by failing to assert it before the first appeal. *Babbitt*, 40 F.3d at 444-45. As the court stated, "the government adequately raised the limitations defense in its answer — it was not required to reassert the defense in its subsequent successful [F.3d 302] summary judgment motion." *Babbitt*, 40 F.3d at 445. I suggest that the D.C. Circuit correctly decided the issue and that the majority's decision to the contrary is not correct.

V.

In sum, in affirming the judgment of the district court, the majority not only goes against the advice of the Supreme Court, which is that questions of qualified immunity are

better decided early rather than late, see *Mitchell*, 472 U.S. at 526, it holds against all authority that the merits of that defense should not be considered at all. Even the district court apparently relented and would have considered the defense post-trial, as indicated in its order of May 25, 1999.

I would vacate the judgment of the district court and remand the case with instructions to consider the defense of qualified immunity under *Behrens and Kennedy v. City of Cleveland.*

FOOTNOTES

> The majority decision, for example, *affirms* the judgment of the district court with respect to Eleventh Amendment immunity. Slip, p. 8. But that judgment refused to consider the subject. The majority then decides the Eleventh Amendment question on its merits, having just affirmed the district court which refused to decide the question.

APPENDIX B

Sales v. Grant, ___ F.3d ___ 991650 (4th Cir. 2000)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INEZ SALES; DEBRA M. MILLER,
Plaintiffs-Appellees,
v.
ALPHONSO L. GRANT, in his individual capacity
and in his official capacity as a member of
the City of Lynchburg Electoral Board;
JOHN E. MASON, JR., in his individual capacity,
Defendants-Appellants,
and
DAVID T. PETTY, JR.,
in his official capacity as member of
the City of Lynchburg Electoral Board;
CITY OF LYNCHBURG ELECTORAL BOARD;
CAROL SPENCER READ; ARELIA LANGHORNE,
in her official capacity as a member of
the City of Lynchburg Electoral Board;
JOHN COBB, in his official capacity as a
member of the City of Lynchburg Electoral Board;
ANNE MARIE MIDDLESWORTH,
in her official capacity as general registrar
of the City of Lynchburg, Defendants.

No. 99-1650
(CA-96-27-L)

Filed: November 29, 2000

ORDER

Appellants filed on August 30, 2000 a petition for rehearing and petition for rehearing en banc. On September 25, 2000, the appellees filed a memorandum in opposition to the petition for rehearing.

Judge Widener voted to grant panel rehearing. Judges Luttig and Williams voted to deny.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of the judges in active service in favor of rehearing en banc. Judges Widener, Niemeyer, and King voted to rehear the case en banc, and Judges Wilkinson, Wilkins, Luttig, Williams, Michael, Motz and Traxler voted against rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Luttig for the Court.

For the Court

/s/ Patricia S. Connor
Clerk

APPENDIX C

Sales v. Grant, 158 F.3d 768

158 F.3d 768

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INEZ SALES; DEBRA M. MILLER, Plaintiffs-Appellants,
v.
ALPHONSO L. GRANT; JOHN E. MASON, JR., in their individual
capacities and in their official capacities as members of the city of Lynchburg Electoral Board; DAVID T. PETTY, JR., in his official capacityas a member of the City of Lynchburg Electoral Board; CAROL SPENCER READ, Defendants-Appellees,
and
CITY OF LYNCHBURG ELECTORAL BOARD,
Defendant.
No. 97-1496
Argued: January 28, 1998

Decided: October 14, 1998
Appeal from the United States District Court for the Western District of Virginia, at Lynchburg. James C. Turk, District Judge.
(CA-96-27-L)
Before WILLIAMS, Circuit Judge, PHILLIPS, Senior Circuit Judge, and
FOX, Chief United States District Judge for the Eastern District of North Carolina, sitting by designation.
Affirmed in part and reversed and remanded for a new trial by published opinion. Senior Judge Phillips wrote the opinion, in which Judge Williams and Chief Judge Fox

joined.

COUNSEL

ARGUED: David Edward Constine, III, MAYS & VALENTINE, L.L.P., Richmond, Virginia, for Appellants. Bradley Brent Cavedo, SHUFORD, RUBIN & GIBNEY, P.C., Richmond, Virginia, for Appellees. ON BRIEF: Anthony F. Troy, Claudia T. Salomon, MAYS & VALENTINE, L.L.P., Richmond, Virginia, for Appellants.

[F.3d 770] OPINION

PHILLIPS, Senior Circuit Judge:

This is an appeal by Debra Miller and Inez Sales, former Assistant Registrars of the City of Lynchburg, Virginia, from a judgment dismissing their action under 42 U.S.C. § 1983 (1994) in which they claimed that members of the Lynchburg Electoral Board violated their constitutional rights by causing them not to be reappointed because of their political affiliations. They principally challenge the district court's dismissal of their claims as a matter of law for failure of proof in their jury trial. They also challenge the court's refusal to apply offensive collateral estoppel to establish the fact of unconstitutional motive for a related non-reappointment decision and the trial judge's refusal to recuse himself for revealed bias. Because we conclude that the court erred in dismissing the claims as a matter of law for failure of proof, we vacate the judgment and remand for a new trial. Because resolution of the collateral estoppel issue could affect a re-trial, we address it and find no abuse of discretion in the district court's refusal to apply it under the circumstances. In view of our vacatur of the judgment on other grounds, we consider it unnecessary to address the recusal issue as it might have affected the judgment appealed, but observe that our declination to address it is without prejudice to the right of Miller or Sales to renew their recusal motion upon remand if so disposed.

I.

In late 1993, Republican George Allen was elected Governor of Virginia replacing incumbent [F.3d 771] Democrat Douglas Wilder. [1] At the time, Linda Arnold was the General Registrar of the City of Lynchburg and Miller and Sales were employed as her Assistant Registrars. Arnold had been appointed in 1983 after the gubernatorial election of Democrat Charles Robb and had selected Sales as Assistant Registrar in 1985 and Miller in 1991. All three had then served continuously until 1995.

In Virginia, a general registrar is appointed for a four-year term by the electoral board of each county or city. Va. Code § 24.2-110. Electoral boards are composed of three members, who are appointed based on the political party that they represent. *Id.* § 24.2-106. The composition of each board is dictated by the political affiliation of the governor currently in office; specifically, the party winning the previous gubernatorial election is entitled to two of the three electoral board seats with the remaining seat being filled by the political party garnering the second highest number of votes for the governorship. *Id.*

Based on the staggered three-year terms of the board members and the term length for the registrar, the newly-constituted board appoints a registrar in the second March after the election of the governor. The electoral board also is empowered to set the number and terms of assistant registrars for its county or city. *Id.* § 24.2-112. However, the registrar, and not the electoral board, appoints the assistant registrars. *Id.*

When Governor Allen was elected, John E. Mason, Jr. was the lone Republican representative on the Lynchburg Electoral Board. Under the "to the victor goes the spoils" arrangement, Samuel Snow was appointed as the second Republican Board member in March 1994 replacing a

Democratic appointee. The other Democratic member, David T. Petty, Jr., remained on the Board.

Within days after Governor Allen's election, Mason attended a meeting with then Chairman of the Lynchburg Republican Committee, Michael Harrington, and then Republican delegate to the Virginia House of Delegates, Stephen Newman, to discuss prospects for Registrar candidates now that a Republican governor had assumed office for the first time in twelve years. (J.A. at 612.) At that meeting, words were used to the effect that "George Allen has won and we get to occupy the registrar's office." (*Id.* at 614.)

On March 10, 1994, Mason contacted Louise B. Plecker, the Registrar of Bath County, to discuss matters including the Lynchburg Registrar position. (*Id.* at 237.) During the course of the conversation, Mason informed Plecker that Arnold was a good Registrar and was performing admirably, but that he wanted to replace her somehow. (*Id.* at 238.) Plecker responded that the appointment of registrar could no longer be dictated by party affiliation and promptly ended the discussion. (*Id.* at 239.) [2]

Around this time, Mason confronted Arnold and asked her whether, under the new circumstances, she was going to seek reappointment. (*Id.* at 607.) By this, he was referring to the new circumstances that there was a new Republican governor; that Arnold's term was coming to an end; and that there would be a Republican Electoral Board majority. (*Id.* at 608.) At the time, Mason knew that Arnold was the Democratic Party's choice for Registrar. (*Id.* at 601-02.)

In August 1994, Arnold received a letter from Robert Garber, the then Chairman of the Lynchburg Republican Committee, accusing Arnold and her office of engaging in partisan politics. (*Id.* at 1034.) Specifically, Garber claimed that the Registrar's office had refused to provide a requesting

constituent with the telephone number for the Republican Party headquarters. (*Id.*) Garber's letter asserted that Arnold "and [her] office operated in a partisan Democratic manor [sic]. If the allegations are true it would [F.3d 772] represent concern to the integrity of the office. Therefore, I would ask that in the future Republicans receive the same type of treatment as their Democratic counterparts." (*Id.*) Arnold forwarded a copy of the letter to Mason and both conducted inquiries into its validity. (*Id.* at 604, 688.) Mason understood the reference to Arnold's "office" to mean Miller and Sales. (*Id.* at 689-90.) His inquiries led him to believe that Garber's accusations were groundless. (*Id.* at 604, 690-91, 695-96.)

In January 1995, Mason met with several Republican delegates to discuss how not to reappoint Arnold. (*Id.* at 629-30.) At the meeting, he solicited guidance about how to proceed without violating the law. (*Id.*) Following this meeting, Mason suggested to fellow Board members Snow and Petty that the Registrar position be advertised. (*Id.* at 275-76.) When neither immediately agreed with Mason, the three Board members decided to delay further discussions on the issue until the Board's next meeting. (*Id.*) After speaking privately with Mason and Alphonso L. Grant, an active supporter of Republican political causes, Snow resigned before the scheduled Board meeting because of general pressure or stress surrounding the reappointment decision. (*Id.* at 265-66.) Grant was selected to replace Snow on the Board and immediately voted with Mason to advertise the Registrar position.

After initiating the advertising, the Board enlisted the City of Lynchburg Personnel Department to handle incoming applications. (*Id.* at 537.) The Personnel Department then narrowed the field by suggesting nine final candidates for interview. (*Id.*) Of these final nine applicants, at least two, Carol Spencer Read and Dori Harvey, had been specifically solicited by Grant to submit applications. (*Id.* at 703-06, 753-

55.) With regard to Harvey, Grant solicited her application through her father, Chip Harvey. Prior to speaking with Chip Harvey, Grant had seen him at Republican functions including fundraisers for political candidates. (*Id.* at 704.) When Dori Harvey submitted her application, it also was accompanied by an endorsement letter from Flo Traywick, a prominent Lynchburg Republican who served as a National Republican Committee Woman. (*Id.* at 670-71.)

During the Personnel Department's involvement in the initial screening process, Robert Chambers was the employee primarily responsible for evaluating the applicants. (*Id.* at 786.) Grant, as liaison for the Board, was the sole member of that group dealing with Chambers at this time. (*Id.* at 787.)

On March 22, 1995, the Personnel Department Selection Committee sent the Electoral Board a memorandum regarding the Registrar position that read as follows: "Two candidates, Lori Nuckles and Dori Harvey, were included; however, in our opinion, both would best be suited in the Assistant Registrar position . . . ." (*Id.* at 1063.) Chambers later testified at trial that he created this memorandum at Grant's direction and inserted language from a draft copy supplied by Grant. (*Id.* at 795.) He asserted that before receiving Grant's draft he had never been asked to evaluate the candidates for possible employment as an Assistant Registrar. (*Id.* at 796.) He further testified that he prepared the memorandum solely because of Grant's direction and did not intend it to be any kind of recommendation from the Personnel Department about the position of Assistant Registrar. [3] (*Id.* at 797, 807.)

On March 28, 1995, Mason faxed Grant a copy of the Garber letter accusing Arnold, Miller, and Sales of engaging in political favoritism. The next day, the Electoral Board, by a vote of 2-1 with Mason and Grant voting together, opted not to reappoint Arnold and, instead, selected Carol Spencer

Read to fill the position.

By Mason's admission, in the course of interviewing applicants for the Registrar position, the Electoral Board on which he and Grant then sat also had concerned itself with the Assistant Registrar position, despite Mason's knowledge that appointments to that position were not within his or the Board's prerogative. (*Id.* at 642, 654.) And, upon notifying Read of her selection on March 29, [F.3d 773] Mason volunteered that she should consider how to treat the Assistant Registrar positions. (*Id.* at 450-51.) Before Mason's call, Read had not thought about the subject and, in fact, was not even aware that the Registrar officially appointed the Assistant Registrars. (*Id.*) Mason informed her that she had several options including: (1) run the office by her self; (2) reappoint Miller and Sales; or (3) "take the recommendations the Personnel Department had given the Board." (*Id.* at 998-99.) In the course of this discussion, Mason advised Read that several problems could arise if Miller and Sales were retained. (*Id.* at 469, 999-1000.) Particularly, because of their loyalty to Arnold, they "could still correspond with [Arnold] and they could give her information as far as what [Read] was doing in [her] office, that type of thing." (*Id.* at 1000.) According to Mason, potential problems from their reappointment included leaking, sabotaging, and unfriendliness. (*Id.* at 469-70, 1000.)

Mason then explained to Read the Personnel Department's recommendations of Harvey and Nuckles that were contained in the March 22 memorandum. (*Id.* at 471.) In later deposition testimony, Read asserted that she "relied upon [the recommendation] very much so because I felt comfortable if the Personnel Department in a major city has screened an individual and made their recommendation, who am I to say that it's not so. So, yes, I took their recommendation very highly." (*Id.*) She also testified in that deposition that, when Mason explained her options, "I didn't know much of what was going on. I didn't understand." (*Id.*

at 470.)

According to Read, when she was later informed by either Mason or Grant that Nuckles had withdrawn, [4] she assumed that "that narrowed the field down to just Dori." (*Id.* at 1003-04.) In testimony read to the jury from an earlier trial, she had elaborated on this point: "I believe it was Mr. Grant who said that personnel had interviewed nine people and that of the nine, two were not qualified to be registrar, but would make good assistant registrars and of those two, one withdrew or was not eligible because her husband is already a constitutional officer. That left Ms. Harvey. I had no choice." [5] (*Id.* at 1006.)

On the same day that Mason notified Read of her appointment as Registrar, Mason and Grant arranged for Read to meet them, along with Dori Harvey and Chip Harvey, at the Piedmont Club for cocktails. (*Id.* at 488-89.) At the Club, Read was introduced to Dori Harvey for the first time. (*Id.*) The next day, Harvey accompanied Read to the Registrar's office and was introduced as Read's assistant during the transition. (*Id.* at 489.)

Later that afternoon, Mason delivered a copy of the minutes of the previous day's Electoral Board meeting to Arnold. (*Id.* at 149.) This version of the minutes stated that Mason "was directed to notify Linda Arnold and her two assistants that they would not be re-appointed . . . . That notice was provided to Arnold via the attached March 29, 1995 memo, and is herewith provided to Arnold so that she may notify her assistants that the end of their terms coincide with hers." (*Id.* at 1036.) Mason also then expressly told Arnold "to make sure that [she] let the girls, you know, notify them of their status." (*Id.* at 151.) When Arnold informed Miller and Sales of the content of the memo, both became very upset and went to speak with the City of Lynchburg Personnel Director about other available positions. (*Id.* at 153, 317.)

Mason later conceded that the language in the minutes concerning the Assistant Registrars was inaccurate and that no discussion about their reappointment or termination occurred at the meeting because it was beyond the Board's authority. (*Id.* at 683.) On April 24, 1995, he amended the minutes to reflect that no decision about the Assistant [F.3d 774] Registrars was made at the March 29 meeting. (*Id.* at 1062.)

On March 31, it having been decided in the interval that Read needed only one assistant, Harvey was officially appointed Assistant Registrar. Before the appointment, Read had not requested any personal references or reviewed Harvey's application, but later testified that she had spent a considerable amount of time with Harvey that demonstrated that her personality was well-suited for the job. (*Id.* at 494-96, 976, 980, 983-84, 1001.) Read also testified that she was not impressed with Miller or Sales because they never asked to speak with her about reappointment, Arnold never mentioned anything about their job performance, and she perceived them as rude during her office visits. (*Id.* at 484-86, 979-80, 990.)

Miller and Sales denied in trial testimony that they were ever discourteous to Read on these occasions. Instead they asserted that in fact they never had the chance to speak with Read because during her office visit following her appointment, she spent her time in Arnold's office. (*Id.* at 319-20.) Both also testified that they assumed they should wait for the positions to be advertised as had been the process for selecting Read as Registrar. Finally, according to Miller and Sales, they proceeded on the assumption that, as reflected in the Board minutes delivered on March 30, their employment as Assistant Registrars had been officially terminated. (*Id.* at 316, 390.)

Following her replacement as Registrar, Arnold sued Mason and Grant in an earlier action under section 1983

claiming that they had replaced her because of her political affiliation in violation of her constitutional rights. Following a jury trial, the jury returned a verdict in favor of Arnold finding that she was not reappointed because of her association with the Democratic Party, and awarding her $150,000 in damages. Before the court heard Arnold's motion for reinstatement as a further remedy, the parties settled the case.

Miller and Sales then brought this section 1983 action against Mason, Grant, Petty, Read and the Electoral Board on comparable claims of unconstitutional conduct in causing them not to be reappointed because of their political affiliation. [6] Relying on the Arnold jury verdict, Miller and Sales moved in limine for an order establishing as a matter of offensive collateral estoppel that Mason and Grant had replaced Arnold because of her political affiliation. They later moved pre-trial to recuse the presiding judge based on allegedly biased statements he had made at a discovery hearing. Following a consolidated hearing on the motions, the district court denied both.

A four-day jury trial then ensued on Miller's and Sales's claims. At the close of the evidence, Mason and Grant moved for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. Responding to movants' argument that Read made the reappointment decisions of "her own mind, without influence," (*id.* at 1010), Miller and Sales argued that Mason and Grant had arranged for Read to have only one choice. That even if Read may not herself have been motivated by political considerations, her decision was essentially preordained by the manipulations of Mason and Grant who plainly were so motivated, and who effectively caused Read to give effect to their politically-motivated purpose.

In a critical ruling, the district court disagreed.

Responding to counsel's contention for Miller and Sales that Mason and Grant had "poisoned the well," effectively directing Read's actions, the court opined: "Not to a person over eighteen years old that has her own mind. . . . [I]f her mind could be that [F.3d 775] easily poisoned then she shouldn't have been appointed Registrar, and I don't think it was." (*Id.* at 1014-15.) The court then explained its conclusion that Miller and Sales had not made out a *prima facie* case of unconstitutional politically-motivated conduct on the part of Mason and Grant.

> In order for the case to be submitted to the jury the plaintiffs must produce some evidence to show that the defendants Mr. Mason and Mr. Grant were responsible for the plaintiffs not being reappointed to the position of assistant registrars and that a substantial or motivating factor for plaintiffs not being reappointed was their political beliefs or affiliations.
>
> There is no evidence to support either element. The court is of the opinion that plaintiffs have failed to make out a *prima facie* case to go to the jury. This is not the ordinary case of a firing or failure to reappoint because of political beliefs.
>
> The party responsible for the election of the assistant registrars is not a defendant in her individual capacity. The plaintiffs claim that it is the defendants Mr. Grant and Mr. Mason who have wronged them, not Mrs. Read. . . .
>
> The newly appointed General Registrar had the legal right to appoint whomever she chose to employ. She had no duty to employ the plaintiffs so long as it was not for the wrong reason, in this case political affiliation.
>
> No evidence that either defendant, Mr. Mason or Mr. Grant, exercised any undue influence over the new

General Registrar as to whom she would appoint.

There's no evidence that Mrs. Read knew anything about the political affiliation of either of the plaintiffs. She had every legal right to employ someone other than the plaintiffs if she had a reasonable doubt about their loyalty to her as the new Registrar.

. . . .

There was nothing wrong with Mr. Mason or Mr. Grant giving the Registrar advice so long as she felt no obligation to act on such advice. The evidence is that Mrs. Read made the actual choice without any limitation or pressure from anyone.

(*Id.* at 1028-29.) Based on this reasoning, the court granted the motion for judgment as a matter of law for insufficiency of proof. This appeal followed.

II.

Miller and Sales challenge the district court's grant of judgment as a matter of law for insufficiency of evidence, the court's denial of their in limine motion for application of collateral estoppel, and the court's denial of their recusal motion. We take these in order.

A.

We review the district court's Rule 50(a) ruling de novo to determine whether the evidence, viewed in the light most favorable to Miller and Sales, would have permitted a jury reasonably to return a verdict in their favor. See *Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 261 (4th Cir. 1996). This requires that we give Miller and Sales, as non-movants, the benefit of every reasonable inference that could be drawn from the evidence, neither weighing the evidence nor

assessing its credibility. See *Al-Zubaidi v. Ijaz*, 917 F.2d 1347, 1348 (4th Cir. 1990). We may then affirm the district court's grant of judgment for Mason and Grant only if, by our assessment, the only conclusion a reasonable jury could draw from the evidence was in their favor, see *Winant v. Bostic*, 5 F.3d 767, 774 (4th Cir. 1993), but we must reverse if, on the other hand, reasonable minds could differ as to the conclusion to be drawn from the evidence. *Id.*; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1985) (stating that under equivalent Rule 56 and Rule 50 standards, judgment as a matter of law is only appropriate "if, under the governing law, there can be but one reasonable conclusion as to the verdict").

The governing law under which we assess the evidence here is settled and undisputed. The First and Fourteenth Amendments protect state and local government employees such as Miller and Sales from discharge or other significant adverse employment actions taken because of their political [F.3d 776] affiliations, see *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 79 (1990); *Elrod v. Burns*, 427 U.S. 347, 360 (1976), unless their public employer "can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved," *Branti v. Finkel*, 445 U.S. 507, 518 (1980), or can prove that even if the action was motivated in part by political considerations, it would have been taken in any event for reasons unrelated to political affiliation. See *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 725 (1996) (applying "mixed-motive" principles of *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977) to patronage termination of service provider's contract with municipality). And, within these general principles, it has been established in this circuit that these substantive protections extend to the Virginia office of assistant registrar and to decisions not to reappoint holders of that office. *See McConnell v. Adams*, 829 F.2d 1319 (4th Cir. 1987).

In seeking to vindicate these rights by their action under section 1983, Miller and Sales had the burden to prove that Mason or Grant, or both, acting "under color of state [law]" had "subject[ed], or cause[d] [them] to be subjected to the deprivation of" those rights. 42 U.S.C. § 1983. Critically for this case, the section 1983 causation language, "subject[ ] or cause[ ] to be subjected," imposes liability not only for conduct that directly violates a right but for conduct that is the effective cause of another's direct infliction of the constitutional injury. As the First Circuit has put it:

> The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.

Gutierrez-Rodriguez v. Cartogena, 882 F.2d 553, 560-61 (1st Cir. 1989) (Bownes, J.) (citations omitted).

This principle of effective causation by indirect means, grounded in the literal language of section 1983 and in general tort law, *see Monroe v. Pape*, 365 U.S. 167, 187 (1961) (holding that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his action"), *overruled on other grounds*, *Monell v. Department of Social Servs. of City of New York*, 436 U.S. 658 (1978), has been widely recognized and applied in section 1983 litigation. *See, e.g., Malley v. Briggs*, 475 U.S. 335, 345 n.7 (1986) (holding that misleading warrant application by section 1983 defendant could be effective cause of ensuing false arrest on judicially-issued warrant); *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988) (holding that misleading statements by section 1983 defendants to prosecutor could be effective cause of ensuing prosecution); *Slakan v. Porter*, 737 F.2d 368, 372 (4th Cir. 1984) (holding that deliberate indifference of prison

officials could properly be found effective cause of subordinates' infliction of constitutional injury); *see also Spell v. McDaniel*, 824 F.2d 1380, 1387 -88, 1390 (4th Cir. 1987) (applying general principle to impose municipal liability for policy found to be effective cause of constitutional injury inflicted by employee). This general principle indisputably applies as well to the section 1983 patronage action here at issue.

In assessing the sufficiency of the evidence under these governing substantive principles, it is important to identify the legal-factual theories upon which the case was tried, hence the specific issue raised by the Rule 50(a) motion.

As earlier indicated, Miller's and Sales's theory, as pleaded and presented at trial, was that though Read's was the official decision not to reappoint, the effective cause of the decision was the politicallymotivated conduct of Mason and Grant which effectively ordained Read's decision. Mason's and Grant's countering defense, as pleaded and presented at trial, was simply a flat denial: their actions had not been the effective cause of the challenged non-reappointment decisions; those decisions had been properly and [F.3d 777] independently made by Read in exercise of her legal powers of office.

The issue for us is therefore a narrow one: whether the evidence was sufficient to support a rational jury finding that Mason and Grant, or either of them, for politically-motivated reasons, [7] effectively caused Miller and Sales not to be reappointed. The district court ruled that the evidence was not sufficient to support the requisite finding of causation linking Mason and Grant to the non-reappointments, and on that narrow basis granted the Rule 50(a) motion. We disagree.

We are satisfied, assessing the evidence *de novo*, that it sufficed under governing section 1983 causation principles

to permit a jury rationally to find that Mason and Grant effectively caused the decision not to reappoint Miller and Sales. Certainly we do not think it possible to say that when assessed in the light most favorable to Miller and Sales, "the only conclusion a reasonable jury could draw from the evidence," was that Mason and Grant did not effectively cause that decision. And, that is the ultimate test we apply. *See Winant*, 5 F.3d at 774.

We believe that little more is needed to explain our conclusion than to refer to our recitation in Part I of the evidence as there deliberately stated in the light most favorable to Miller and Sales. Miller and Sales properly have emphasized certain of this evidence and inferences reasonably to be drawn from it as most critically supporting their position. We summarize.

- From the outset of the Registrar selection process conducted by the Electoral Board, Mason and Grant (once he was appointed), had sought, successfully in the end, to use that process as a means for insuring the appointment of new Assistant Registrars as well, despite the fact that this was not within the Board's prerogative. Grant had, in fact, actively solicited Dori Harvey, the eventual appointee as Assistant Registrar, to apply for the Registrar position.

- Once on the Board, Grant, who had talked with Mason about the matter, took a direct step to use the Registrar selection process for that purpose. Acting on his own so far as the record shows, he drafted and directed the Personnel Department to send the Electoral Board a memorandum identifying two of the nine recommended finalists for the Registrar position, one being Dori Harvey, as "best . . . suited in the Assistant Registrar position." This did not reflect any actual evaluation by the Department, which had not been charged with evaluating Assistant Registrar candidates, and was done

only because directed by Grant.

- In the course of notifying Read that she had been appointed Registrar, Mason brought up the subject of how she should deal with the Assistant Registrar positions. Until that time, Read had not known that she selected them, and had therefore given the subject no thought. Mason elaborated by suggesting three options: do without any; reappoint Miller and Sales; or "take the recommendations the Personnel Department had given the Board." As to the option of [F.3d 778] reappointing Miller and Sales, Mason suggested there could be several problems arising from their continued loyalty to Arnold, including correspondence with and leaking of information to her about Read's conduct of the office, "that type of thing." As to the option of taking the Personnel Department's recommendation, Mason advised Read of the memorandum drafted by Grant that had identified Harvey and Nuckles as "suited" for that position. Read knew neither of them; indeed at the time she "didn't know much of what was going on."

- That very night, by Mason's and Grant's arrangement, Read met with them, Dori Harvey, and Harvey's father at the Piedmont Club for cocktails. This was the first time Read had ever met or talked with Harvey. The next day, Harvey accompanied Read to the Registrar's office and was there introduced as Read's assistant during the transition period. At that time, Read had requested no personal references for Harvey nor reviewed Harvey's application for the Registrar position.

- Later that same day, Mason delivered to Arnold a copy of the purported minutes of the previous day's Board meeting which stated that "Mason had been directed to notify Linda Arnold and her two assistants that they would not be reappointed . . . ." Mason also then directed Arnold to tell Miller and Sales that, per the minutes, they

would not be reappointed, and Arnold did so. When later confronted with the fact that the Board had no authority in the reappointment of Assistant Registrars, Mason took the awkward position that the statement was inaccurate, that the Board had not discussed the Assistant Registrars' reappointment. He then had the minutes amended to reflect what he now said was the fact at odds with that earlier reported.

- Sometime during this period, either Mason or Grant notified Read that Nuckles had withdrawn from consideration for an Assistant Registrar position, whereupon, according to Read, she assumed that "that left Ms. Harvey. I had no choice." Nuckles had not, in fact, withdrawn.

- Two days after first meeting Harvey, still without having sought any personal references or read her application or any evaluation (if such there was) by the Personnel Department, Read officially appointed Harvey as her sole Assistant Registrar, the Board having decided in the interval that there should be only one.

We agree with Miller and Sales that a jury rationally could infer from this and related contextual evidence that though Mason and Grant did not themselves make the decision not to reappoint, their endeavors were, as intended, its effective cause. More specifically, that their endeavors had the intended effect of foreclosing for Read any choice but to replace Miller and Sales with Dori Harvey. And, that this was accomplished by taking advantage of Read's deliberately encouraged dependence upon them in a new and unfamiliar and fastmoving situation to convince her that she had but one choice, a choice bolstered by a bogus official recommendation that they had contrived.

Against the weight of this evidence and its inferential force on the causation issue, Mason and Grant mainly seek to

support the district court's ruling by pointing to conflicting evidence on critical matters. Grant denied contriving a bogus recommendation for Harvey. Read recanted her earlier testimony that she was confronted with but one option — to select Harvey — and that in making her choice she relied heavily on Mason and Grant; in later testimony she asserted her complete independence in choosing among a number of options, including the reappointment of Miller and Sales. Mason explained away as simple inadvertence the misrepresentations in the Board minutes that he used to inform Miller and Sales of their non-reappointment. It is elementary, however, that these conflicting versions have no relevance to the Rule 50(a) ruling, despite Mason's and Grant's rather surprising reliance upon them as the linchpin of their argument.

The crux of the causation issue here is, of course, whether Read did indeed act as an independent agent in deciding to appoint Harvey and not to reappoint Miller and Sales, or whether though she made the official decision, it was effectively made for [F.3d 779] her by Mason and Grant. In ruling dispositively for Mason and Grant on the causation issue, the district court seems to have relied almost entirely upon Read's credibility in asserting her independence. But that, of course, the court could not properly do in ruling on this Rule 50(a) motion in the face of the considerable evidence favorable to Miller and Sales, including Read's own inconsistent prior testimony, drawing that independence in doubt — certainly in genuine issue — as a practical matter. [8] *Cf., e.g., Mason v. Oklahoma Turnpike Authority*, 115 F.3d 1442, 1451 (6th Cir. 1997) ("The jury may have found it peculiar that [a managing director] would hire as his assistant a person he barely knew and had never interviewed"). The conflicting evidence favoring Miller and Sales, not being implausible on its face, should have been given precedence in ruling on the motion. [9]

As earlier noted, supra note 7, despite reservations as to whether the issue has been properly raised and preserved for review, we have concluded to address the sufficiency of the evidence to permit a finding that Mason's and Grant's challenged conduct was politically motivated.

Miller's and Sales's burden was to offer sufficient evidence to permit a finding that that conduct was substantially motivated by political considerations. *See O'Hare Truck Service*, 518 U.S. at 725. Those considerations might relate either to the targeted person's affiliation with one political party or lack of affiliation with or support of another party. *See Rutan*, 497 U.S. at 64; *Elrod*, 427 U.S. at 359-60.

The evidence here clearly sufficed to support, though surely not to compel, a finding that Mason's and Grant's conduct, which we earlier have concluded could be found the effective cause of the challenged non-reappointments, was also politically motivated. Again, we summarize.

> - In the immediate aftermath of the Republican gubernatorial victory, Mason, then the lone Republican on the Electoral Board, met with other local Republican office-holders [F.3d 780] to discuss, among other things, candidates for the Registrar position, now that "George Allen has won and we get to occupy the Registrar's office."
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> - Following up, Mason contacted the Bath County Registrar to discuss, among other matters, the Registrar position in the City of Lynchburg, noting that though Arnold, the Democrat incumbent, was doing a good job, he wanted somehow to replace her.
>
> - Later, still during Arnold's incumbency, Mason met with several Republican office-holders to discuss ways not to reappoint Arnold without violating the law.

- During the application process for the Registrar position, Grant solicited Dori Harvey's application through her father, Chip Harvey, whom Grant knew to be a participant in Republican fundraising and other events. At the time, Mason did not know Dori Harvey, but knew her mother was a Republican and presumed her father to be. When Harvey's application was filed, it was supported by Flo Traywick, a prominent Lynchburg Republican.

- Mason and Grant knew at this time that Arnold, the incumbent Registrar, had been appointed by a Democrat-majority Electoral Board and that Arnold had appointed both Miller and Sales. And they also knew that the local Republican Committee Chairman had accused Arnold and her office of conducting the office in a politically partisan manner.

- Finally, there is the undisputed fact that all three members of the Registrar's office, being either known or assumed by Mason and Grant to be associated with or beholden to the Democratic Party, were replaced at the first opportunity that arose after Mason and Grant came to be the required Republican majority on the Electoral Board.

We are satisfied that from this evidence a jury reasonably could infer that Mason's and Grant's conduct respecting the Assistant Registrar positions was substantially, if not entirely, motivated by political considerations. Mason and Grant point out that there was no direct evidence that they sought to insure Harvey's appointment because of her Republican Party ties or to replace Miller and Sales because of any known or assumed Democratic Party affiliations. But, constitutional "patronage" law is clear that the requisite political motivation, as any state of mind, can be proved by circumstantial evidence as commonly the only kind available for this purpose. *See, e.g., Anthony v. Sundlen*, 952 F.2d 603,

605-06 (1st Cir. 1991) (holding that proof of political motivation in patronage case not confined to "(relatively rare) instances in which a `smoking gun' can be produced" and commenting that "circumstantial evidence alone can support a finding of political discrimination"); *Cygnar v. City of Chicago*, 865 F.2d 827, 844-45 (7th Cir. 1989) (holding that evidence that patronage targets' names were known by defendant to be on Democratic Party contributors' list sufficient to support finding that defendant knew, despite his denial, of their political affiliations). The concededly circumstantial evidence here was clearly sufficient to support the required finding.

B.

We next address Miller's and Sales's challenge to the district court's refusal to grant their motion in limine for an application of collateral estoppel based upon the jury verdict for Arnold in her earlier patronage action against Mason and Grant. [10] Specifically, they sought a ruling that in their action it was an established fact — with the jury to be so instructed — that Mason and Grant had caused Arnold's non-reappointment as Registrar for politically-motivated reasons.

This would have involved an offensive use of collateral estoppel which, though permissible in appropriate circumstances in federal courts, is committed, because of its particular possibilities for inequity, to "broad" trial court discretion. *See Parkland Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331 (1979). The [F.3d 781] district court exercised its discretion here by refusing to apply collateral estoppel, expressly relying on two factors: that Miller and Sales might have joined the earlier Arnold action, see *id.* (noting this as a factor militating against preclusion), and that the Arnold action had been settled, thereby avoiding appellate review.

These are relevant and significant factors properly taken into account by the district court in exercising the broad

discretion committed to it in deciding whether to apply offensive collateral estoppel. We cannot therefore, declare its decision to refuse application here an abuse of discretion, and accordingly, affirm its ruling.

C.

Finally, we consider Miller's and Sales's challenge to the trial judge's refusal to grant their pretrial motion under 28 U.S.C. § 455 (1993) that he recuse himself because of his demonstrated bias against their cause.

In support of their motion, Miller and Sales presented evidence of several alleged manifestations of bias on the judge's part. In a telephone conference with counsel for both sides on February 24, 1997, before any evidence on the merits had been presented, the judge volunteered that "they [referring to defendants] had every reason not to hire those ladies [referring to plaintiffs]." (J.A. at 33, 57.) Further, the judge indicated that because Arnold had threatened suit, Grant, Mason, and/or Read were justified in not reappointing Miller and Sales and that doing so was non-discriminatory. When informed by counsel that defendants did not appear to be pressing Arnold's threat of a lawsuit as their defense in this case, the court remarked "of course they won't say that, but it's human nature." (*Id.* at 36-37.)

During the hearing at which he denied the recusal motion, the judge expressed his dissatisfaction with the outcome of the Arnold litigation, commenting that he should not have sent the Arnold case to the jury and was surprised by the verdict because he did not believe there was any evidence to support it. (See *id.* at 63-68.) He also remarked that he "felt a little guilty" about suggesting that the parties in the Arnold case pursue a settlement. (*Id.* at 86.) During arguments on the Rule 50(a) motion, when counsel for Miller and Sales contended that the court should allow the evidence to go to the jury, the judge responded: "No, I made that mistake in

[the Arnold] case and I'm not going to make it here today." (*Id.* at 1026-27.)

28 U.S.C. § 455(a) provides that "any justice, judge, or magistrate shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Under this statute, "[t]he standard to be applied is an objective one, to foster not only actual impartiality but also the appearance of impartiality." *United States v. Carmichael*, 726 F.2d 158, 160 (4th Cir. 1984) (citations omitted). A trial judge's denial of a recusal motion is reviewed for abuse of discretion. See *United States v. Gordon*, 61 F.3d 263, 267 (4th Cir. 1995).

In the principal Supreme Court decision interpreting section 455(a), the Court emphasized that disqualifying bias or partiality must normally arise from events, proceedings, or experiences outside the courtroom. See *Liteky v. United States*, 510 U.S. 540, 555 (1994). Opinions formed during judicial proceedings can, however, under limited circumstances require recusal. As the *Liteky* court put it:

> Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deepseated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Id.

Because we have determined that a new trial must be ordered on other grounds, we [F.3d 782] believe it unnecessary to determine whether the district court also committed reversible error by declining to recuse under section 455. Our declination to determine that issue is without prejudice to the right of Miller and Sales if so disposed, to raise it again on the remand we order. If raised then, it must be assessed in the different context that results from this appeal and its result.

AFFIRMED IN PART; REVERSED AND REMANDED FOR NEW TRIAL.

FOOTNOTES

[1] Because the principal issue on appeal is the sufficiency of the evidence to survive a motion challenging it, we recite the facts on the basis of undisputed evidence or as viewed in the light most favorable to Miller and Sales, sometimes noting specific conflicts in testimony on particularly critical issues.

[2] When Arnold was initially appointed, and until this court's decision in *McConnell v. Adams*, 829 F.2d 1319 (4th Cir. 1987), it apparently was accepted bipartisan practice to select registrars based on partisan political considerations.

[3] In countering trial testimony, Grant denied Chambers's version, asserting that he never gave Chambers any draft memorandum and that Chambers was lying. (*Id.* at 902-03.)

[4] In conflict with this version of Nuckles's conduct, Nuckles testified that she never withdrew her name from consideration. (*Id.* at 812-13.)

[5] Testifying at trial of this action, Read changed her version of these events. At trial she asserted that she did have a choice and that neither Grant nor Mason caused her not to reappoint Miller or Sales. (*Id.* at 991, 1004.) She further

asserted that, at the time, she believed she had about six different options how to proceed and that she did not feel any compulsion in making her decision. (*Id.* at 465, 991, 998.)

[6] Mason and Grant were named in their individual and official capacities. Petty and (presumably, though not nominally) Read were sued only in their official capacities. No point has been raised about the amenability of the Board to suit. The theory upon which the claim was tried, as advanced by Miller and Sales and as understood by the court and opposing parties, was that Mason and Grant were the active agents in causing Miller and Sales not to be reappointed. It was on this basis that they alone were sued in their individual, as well as official, capacities. The other named defendants, Petty, Read, and the Board itself, were only sought to be held liable in their official capacities on the claim for injunctive relief of reinstatement were Mason and Grant found to have caused a violation of the asserted constitutional right.

[7] Although in their brief Mason and Grant dance vaguely around the sufficiency of the evidence of their political motivation, it is doubtful that they have properly raised and preserved that issue as an alternative basis for affirming the judgment. The reason for the ambivalence is obvious. Under their consistently maintained position that they did not directly or indirectly cause the non-reappointments, the motivation for whatever they may have done in the matter was factually and legally irrelevant. They say exactly that at one point in their brief: "Whether Grant and Mason considered plaintiffs to be part of Arnold's democratic administration is irrelevant. Read made the appointment, not Grant or Mason." (Appellees' Br. at 21.) Consistent with this theory, they did not base their final, oral Rule 50(a) motion on a lack of proof of their political motivation, and the district court's ruling, consistent with that position and with the court's obvious view of the case, addressed only Read's motivation: "There is no evidence that Mrs. Read knew

anything about the political affiliation of either of the plaintiffs." (J.A. at 1029.)

We might therefore properly decline to consider as an alternative ground for affirmance the insufficiency of evidence of their political motivation and confine review to the narrow issue whether there was sufficient evidence that they caused the non-reappointments. *See* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 2533, 2536 (2d ed. 1995).

In view of the ambiguity of the record on this point, and the obvious relevance of the issue on any re-trial, *see id.* at § 3536 (noting law of the case implications), we will assume, for purposes of the case, that it is properly before us and will address it in following text.

[8] Miller and Sales suggest that the district court's ruling is flawed not only in its raw evidence assessment but by a legal misapprehension of the controlling causation rule. Specifically, they say the court erroneously thought the standard was "undue influence" by Mason and Grant, which would require — borrowing from the term's use in other contexts — proof of some form of "coercion" or "fraud." The district court did use the term in opining that Mason and Grant had not used "undue influence" in affecting Read's judgment. If this did reflect a belief that the requisite § 1983 causation could only be found on that basis, we agree that this was an erroneous view. Here, however, we need not attempt to divine whether the district court actually applied a more stringent causation standard than was proper for, in our judgment, his critical assessment was erroneous under the proper standard.

[9] Tangentially, in the Statement of Facts section of their brief (*see* Appellees' Br. at 2, 3), Mason and Grant say that Miller and Sales "never sought appointment to new four-year terms from . . . Read . . . never took any action, made any request

or comment about wanting to be appointed, etc." This assertion — made as one of Fact — is not formally made the basis of any legal argument against causation proof in the Argument section of their brief, except as it may be inferred from a cryptic comment made in an Argument sub-section concerning political motivation where it is said that "Sales and Miller never asked Read to consider them to be her assistants." (*Id.* at 28.)

Again, as in the case of the political motivation issue, *see supra note* 7, this was not made a basis for their oral Rule 50(a) motion, nor was it a basis for the district court's ruling on that motion. Consequently, we are also doubtful that it should be considered properly raised and preserved for review under the applicable rules. If it were, it would be without merit. In the first place, the assertion in the Argument section of the brief is immediately followed by the negating recognition that "Nonetheless, Read understood that appointing either or both as assistants was an option for her. She . . . chose not to appoint either of them." (Appellees' Br. at 28.)

Beyond that concession, the law is against any suggestion that a failure to make formal application under the circumstances of this case would *per se* preclude proof of a patronage claim. *See Brett v. Jefferson County*, 123 F.3d 1429, 1433 n.9 (11th Cir. 1997) (so holding). Where, as here, the evidence would support a finding that before they had had any opportunity to make formal application, they had been officially advised that they would not be reappointed, it would support a finding that they need not have taken that futile step in order to preserve a viable claim. *Cf. Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1451 (4th Cir. 1990) (holding in commercial employment case that application is unnecessary where it reasonably appears futile).

[10] Although we remand for a new trial on other grounds, we address this issue because of its possible relevance in further proceedings.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG VIRGINIA

[Filed May 17, 1999]

Case No: 96-0027-L

INEZ SALES AND DEBRA MILLER,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
ALPHONSO L. GRANT, ET AL.,	)	**ORDER**
	)	
Defendants.	)	

In accordance with the written Memorandum Opinion entered this day, it is hereby **ADJUDGED AND ORDERED** that the plaintiffs' motion to quash the summary judgment motions of the defendant is **GRANTED.**

The Clerk is directed to strike this matter, and the defendants' two pending summary judgment motions from the active docket of this Court and send a certified copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

Entered this 17th day of May, 1999.

Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG VIRGINIA

[Filed May 17, 1999]

Case No: 96-0027-L

INEZ SALES AND DEBRA MILLER,	)
	)
Plaintiffs,	)
	)
v.	)
	)
ALPHONSO L. GRANT, ET AL.,	)
	)
Defendants.	)

MEMORANDUM OPINION

By: Jackson L. Kiser, Senior United States District Court Judge

Before me now is plaintiffs' motion to quash two summary judgment motions brought by the defendants. Defendants Grant and Mason seek summary judgment on the basis of Eleventh Amendment immunity, and also on the ground that they are protected from suit for damages by the doctrine of qualified immunity. Because I find that these summary judgment motions exceed the scope of the case as it was remanded by the Fourth Circuit for the reasons set forth herein, the plaintiffs' motion to quash is hereby **GRANTED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

This complaint, originally filed April 1, 1996, was brought by two former assistant registrars for the City of Lynchburg, alleging violations of 42 U.S.C. §1983 in

connection with their failure to be reappointed to their positions, allegedly for political reasons. On June 4, 1996, the defendants filed a Rule 12(b)(6) motion to dismiss. This motion was denied by the district court judge. On February 24, 1997, the defendants filed a motion for summary judgment. The judge did not rule on the motion at that time, instead taking it under advisement until presentation of the plaintiff's case in chief per his order of March 18, 1997. A four day jury trial was held, being April 1, 1997. At the close of the evidence, the defendants moved for judgment as a matter of law. On April 8, 1997, the district court granted defendants' motion for judgment as a matter of law. The plaintiffs appealed this ruling.

II. DISCUSSION

On October 14, 1998, the United States Court of Appeals for the Fourth Circuit issued an opinion in *Sales v. Grant*, 158 F.3d 768 (4th Cir. 1998), reversing the district court's decision and remanding the case for a new trial, which is scheduled for June 1-4, 1999. The Fourth Circuit held that the trial judge was in error in granting the defendants' Rule 50(a) motion at the close of evidence:

> The issue for us is therefore a narrow one: whether the evidence was sufficient to support a rational jury finding that Mason and Grant, or either of them, for politically motivated reasons, effectively caused Miller and Sales not to be reappointed. The district court ruled that the evidence was not sufficient to support the requisite finding of causation linking Mason and Grant to the non-appointments, and on that narrow basis granted the Rule 50(a) motion. We disagree.

Id. at 777. The court specifically held that a reasonable jury could have found (1) that "though Mason and Grant did not themselves make the decision not to reappoint, their

endeavors were, as intended, its effective cause," and (2), that their behavior was "substantitally, if not entirely, motivated by political considerations." *Id.* at 779, 780. The Fourth Circuit remanded this case for re-trial so that a jury may make findings on these two issues. It is therefore inappropriate for the defendants to raise the defenses of qualified immunity and Eleventh Amendment immunity at this late date.[1] Accordingly, I need not address the merits of defendants' arguments on these issues.

The defendants argue, at least with regard to the motion for summary judgment based on a theory of qualified immunity, that they could not have raised this issue before because the very opinion issued by the Fourth Circuit in this case changed the scope of what behavior constitutes causation for a claim of politically motivated discharge, and therefore changes what the parameters of what the defendants should have known to be unconstitutional for purposes of a qualified immunity defense. I disagree. The Court of Appeals' opinion in this case does not deviate from existing law on what level of activity constitutes causation. The opinion unequivocally states:

> The governing law under which we assess the evidence here is **settled and undisputed**. The First and Fourteenth Amendments protect state and local government employees such as Miller and Sales from discharge or other significant adverse employment actions taken because of their political affiliations, unless their public employer can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved, or can prove that even if the actions was motivated in part by political considerations, it would have been taken in any event for reasons unrelated to political

[1] There is , in fact, a serious question about whether the defendants have waived these defenses. The plaintiffs, however, did not want to rely on a theory of wavier because of the possibility of an interlocutory appeal.

> affiliation...Critically, for this case, the §1983 causation language, "subject[] or cause[] to be subjected," imposes liability not only for conduct that directly violates a right but for conduct that is the effective cause of another's direct infliction of constitutional injury.

Id. at 775-776. (internal citations and quotations omitted)(emphasis added). The law on political patronage in public hiring and discharge, as developed by the United States Supreme Court in *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980), and *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990), is clear. It was enunciated, not modified, by the Fourth Circuit in *Sales v. Grant*. All that remains in this case is for a jury to apply the law to the facts as it finds them. The time for further argument on other legal issues has passed.

III. CONCLUSION

I find that it would be inappropriate for me to alter the landscape of this case as it was remanded. In light of the clear mandate handed down by the Fourth Circuit, and the narrow contours of that decision, I decline to entertain new summary judgment motions by the defendants. The plaintiffs' motion to quash is **GRANTED.**

An appropriate order shall issue.

_____

Senior United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
- LYNCHBURG VIRGINIA

[Filed May 17, 1999]

Case No: 96-0027-L

INEZ SALES AND DEBRA MILLER,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
ALPHONSO L. GRANT, ET AL.,	)	**ORDER**
	)	
Defendants.	)	

It is hereby **ADJUDGED AND ORDERED** that the plaintiffs' motion to certify the defendants' appeal as frivolous is **GRANTED**.

In *Behrens v. Pelletier*, 116 S.Ct. 834, 841 (1996), the Supreme Court recognized that district courts may certify appeals as "frivolous" and retain jurisdiction to proceed to trial despite a pending appeal. While I disagree with the defendants' position regarding qualified immunity and Eleventh Amendment immunity, I do not find the appeal frivolous on the merits. Instead, I grant certification because (1) the defense giving rise to the appeal has been waived because it should have been raised and decided prior to the first trial in this case, and (2) the Fourth Circuit's mandate in *Sales v. Grant*, 158 F.3d 768 (4th Cir. 1998) does not include

pretrial motions for this Court's consideration. Furthermore, I agree with the plaintiffs that the defendants may raise these motions with the Court post-trial, and the defendants will be free to appeal decisions rendered at that time, subsequent to the conclusion of the jury trial. This approach would promote judicial efficiency and economy.

The Clerk is directed to strike this matter from the active docket of this Court and send a certified copy of this Order to all counsel of record.

Entered this 25th day of May, 1999.

_____

Senior United States District Judge

00-1404

Record No. 101404

Supreme Court, U.S.
FILED
APR 3 2001
OFFICE OF THE CLERK

In The Supreme Court of the United States

ALPHONSO L. GRANT, in his individual capacity and in his official capacity as a member of the City of Lynchburg Electoral Board and JOHN E. MASON, JR., in his individual capacity, et al.,

Petitioners,

v.

INEZ SALES and DEBRA M. MILLER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Anthony F. Troy
David E. Constine, III
Troutman Sanders Mays & Valentine LLP
Post Office Box 1122
Richmond, Virginia 23218-1122
(804) 697-1200
FAX: (804) 697-1339

Counsel for Respondents

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED

Did the Fourth Circuit correctly hold that Petitioners waived, abandoned, and forfeited their right to pursue the affirmative defense of qualified immunity after they went through an entire trial and an appeal without pursuing the defense, waiting until the case was remanded for a second trial (more than three years after the initial complaint was filed) and less than one month before the start of that second trial to bring the issue of qualified immunity to the attention of the District Court?

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INTRODUCTION

Respondents Inez Sales and Debra M. Miller ("respondents" or "plaintiffs") hereby submit this brief in opposition to the Petition for Writ of Certiorari ("the Petition") filed by petitioners Alphonso L. Grant ("Grant") and John E. Mason, Jr. ("Mason") (collectively "petitioners" or "defendants") which seeks to overturn the decision below of the United States Court of Appeals for the Fourth Circuit. In *Sales v. Grant*, 224 F.3d 293 (4th Cir. 2000) ("*Sales II*"), the Fourth Circuit held that under the *narrow circumstances* of this case, where the defendants did not pursue a defense of qualified immunity after going through an entire trial and an appeal, they waived the defense and could not pursue it on remand for the first time less than one month before the commencement of a second trial. The Court explained that:

> Under the circumstances, we have no trouble concluding that defendants waived their right to press seriously their claim of qualified immunity for the first time after remand.

Id. at 296. Following the decision in *Sales II*, the defendants filed with the Fourth Circuit a petition for rehearing and rehearing *en banc*, which was denied.

Defendants' claim of qualified immunity has been rejected at every turn because it is futile and has no substantive merit, and because petitioners waived their right to assert the defense by waiting more than three years to do so. Let there be no mistake that the goal of petitioners in pursuing a qualified immunity argument at such a very late stage is plain and simple – to delay this case from getting to the jury. Petitioners knowingly and intentionally discriminated against the plaintiffs because of the plaintiffs'

political affiliations and defendants now wish to avoid a jury verdict. Defendants therefore raised the only argument which would allow them, by filing an interlocutory appeal, to delay a second trial on the merits. The Petition for Writ of Certiorari is petitioners' last attempt at delay and it is unsupportable as a matter of law.

The Fourth Circuit found that the petitioners had waived their right to assert qualified immunity, but the Court was careful to limit its holding to the specific and unusual facts of this case, stating as follows:

> [In finding waiver] we do not hold categorically that a section 1983 defendant must pursue the defense of qualified immunity on every occasion possible in order to preserve his right to raise that defense in later proceedings. Rather, we hold only where, as here, a defendant only cursorily references qualified immunity in his answer . . . and thereafter fails to mention, let alone seriously press, his assertion . . . despite filing several dispositive motions . . . and despite participating in a trial on the merits of the section 1983 claim, that defendant may not actively pursue his claim of qualified immunity for the first time after appeal.

Id. at 296.

There is nothing surprising or unusual about the holding of the Fourth Circuit, which is limited to the particular facts and is supported by well established precedent that the defense of qualified immunity is subject to waiver. The decision is also consistent with those of other

United States Circuit Courts of Appeal which have rejected the precise argument made by defendants in this case, i.e. that the mere reference to qualified immunity in an answer preserves the defense for all time and forever insulates a defendant from a claim of waiver. *See, e.g., Walsh v. Mellas*, 837 F.2d 789, 799-800 (7th Cir. 1988) (holding that a defendant who simply raised the defense in his answer, but failed to pursue the defense at any other time through the first trial had waived the defense and could not assert it on remand or during a second appeal). Plaintiffs are aware of no case, and petitioners have cited none, which has adopted the argument that a cursory reference to the defense of qualified immunity in an answer forever preserves the right of a defendant to assert the defense, regardless of the stage of the proceedings.

The self-evident reasoning behind the Court's decision in *Sales II* is that pursuing a defense of qualified immunity for the first time after a full-blown trial and an appeal, can be the platform for a strategy of delay and is subject to abuse through the right of an interlocutory appeal. Waiver is therefore a crucial shield to fight against such a strategy of delay. The decision of the Fourth Circuit recognizes the necessity of the waiver principle where, as in this case, the defendants had no legitimate excuse for delaying three years before pursuing a claim of qualified immunity.

In the face of the substantial precedent supporting the decision of the Fourth Circuit in *Sales II*, defendants argue their delay in asserting qualified immunity was justified because they somehow could not have raised the defense in advance of the Fourth Circuit's decision in the first appeal, *Sales v. Grant,* 158 F.3d 768 (4th Cir. 1998) ("*Sales I*"). Specifically, defendants argue *Sales I* changed the law of

proximate cause, and therefore gave rise to a qualified immunity defense, because it recognized, for the first time according to defendants, the theory that 42 U.S.C. § 1983 ("Section 1983") "imposes liability not only for conduct that directly violates a right[,] but for conduct that is the effective cause of another's direct infliction of the constitutional injury." *Sales I*, 158 F.3d at 776. Defendants' argument borders on the absurd – this principle of effective causation by indirect means is nothing more than the basic definition of "proximate cause," which is hardly a new concept and known to anyone who has taken a first-year torts class.[1]

In *Sales I*, the Fourth Circuit applied well established law under Section 1983, stating that the "*governing law under which we assess the evidence here is settled and* undisputed," and that the principle of "effective causation" was "grounded in the literal language of § 1983 and in general tort law . . . [and] has been widely recognized in

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[1] Not only is defendants' argument meritless because *Sales I* did not create new law, their whole qualified immunity theory is futile and meritless. Defendants argue that they are entitled to qualified immunity because plaintiffs' theory of *causation* is novel. Plaintiffs are aware of *no case* that allowed qualified immunity to be asserted on the basis of a causation theory. Instead, causation is a question of fact for the jury. The only issue for determining the validity of a qualified immunity defense is whether the *plaintiffs' rights* were clearly established. *See e.g.*, *Triad Associates, Inc. v. Chicago Housing Authority*, 1997 WL 160744 (N.D. Ill. 1997) (rejecting defendants' effort to merge the issues of causation and qualified immunity, stating "[defendant] has not cited, and nor have we discussed, any authority linking the issues of causation and damages to qualified immunity. As plaintiffs indicate, the issues of causation and potential damages are factual questions for the jury ..."). In this case, the law has been clear since the mid-1980s that assistant registrars in Virginia cannot be discriminated against on the basis of their political affiliation. *McConnell v. Adams*, 829 F.2d 1319 (4th Cir. 1987). Defendants were on notice of the law and knew, as they so testified, that they could not, for political purposes, cause Read (the registrar) to not reappoint plaintiffs as assistant registrars. J.A. 168 176-177.

§ 1983 litigation." *Id.* at 775-76 (numerous citations omitted) (emphasis added). Indeed, the language of Section 1983 itself, which was enacted 130 years ago, expressly incorporates the principle of effective causation. Specifically, Section 1983 imposes liability on a person who, acting under color of state law, "subjects or *causes* to be subjected" another person to a constitutional deprivation. 42 U.S.C. § 1983; *Sales I*, 158 F.3d at 776. Accordingly, the defendants' argument that *Sales I* somehow expanded the law and established a new legal theory of causation is not supportable.

Defendants also have known since the day they were served in 1996 that they, as Electoral Board members of the City of Lynchburg, Virginia, were being accused of causing, by fraud and deception, the newly-appointed Registrar of the City (Carol S. Read) to not reappoint plaintiffs, who were incumbent Assistant Registrars, based on their political affiliations. If plaintiff's theory of causation was truly novel, defendants should have raised and pursued their claim for qualified immunity in a dispositive motion or at trial prior to remand. Plaintiffs should not be further delayed in their effort to obtain justice – *they have been waiting more than five years* to have a jury decide their case and have incurred substantial expense in a trial and on two appeals.

The simple fact is that defendants waived any qualified immunity defense by failing to pursue it before or during the first trial or on appeal in *Sales I*. The holding of the Fourth Circuit in *Sales II* is limited to these facts and is in full accordance with existing law. In other words:

> What we have here is an intensely fact-specific case in which the court below unquestionably applied the correct rule of

> law and did not unquestionably err – precisely the type of case in which we are *most* inclined to deny certiorari.

Kyles v. Whitley, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting) (emphasis in original). There is simply no reason or need for this Court to grant a writ of certiorari.

STATEMENT OF THE CASE/PROCEDURAL HISTORY

Respondents submit that petitioners' "Statement of the Case" is little more than a five and a half page diatribe challenging the law applied to this case by the Fourth Circuit in *Sales I*. What is missing is a full description of the numerous times in the proceedings prior to the first trial and the appeal in *Sales I* that petitioners raised dispositive legal challenges to the respondents' case, while, at the same time, failing to raise or press a defense of qualified immunity. A brief summary of the many chances that petitioners' had to raise their qualified immunity defense follows.

Plaintiffs are the former Assistant Registrars for the City of Lynchburg, Virginia. Plaintiffs claim that in March 1995, Grant and Mason, who then comprised a Republican majority of the three-member City of Lynchburg Electoral Board ("the Electoral Board"), violated their constitutional rights by causing them not to be reappointed to their positions because of their political affiliation with the Democratic Party. Plaintiffs claim that Grant and Mason accomplished this by engaging in deceptive and fraudulent acts which allowed them to manipulate and control the decision of the General Registrar, Carol S. Read, who had just been appointed to the position by Grant and Mason.[2] By

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[2] Read had been appointed by Grant and Mason in March 1995 to replace Linda Arnold as General Registrar. In July 1995, a federal jury found

- footnote continued -

falsely telling Read that plaintiffs would sabotage the office if reappointed, and otherwise manipulating Read's decision through such actions as palming off to her a bogus recommendation of the defendants' chosen candidates for Assistant Registrar which appeared to come from the City of Lynchburg Personnel Department, but which actually had been drafted by Grant, defendants caused Read not to reappoint or even consider plaintiffs. This case has already been the subject of an earlier appeal, *see Sales I*, and the facts of the case are set forth in that published decision.

There was abundant evidence that Grant and Mason caused plaintiffs not to be reappointed "by taking advantage of Read's deliberately encouraged dependence on them in a new and unfamiliar and fast-moving situation to convince her that she had but one choice [to appoint Dori Harvey, plaintiffs' eventual replacement, who had been hand-picked by Grant and Mason], a choice bolstered by a bogus official recommendation that they had contrived." *Sales I,* 158 F.3d at 778. In addition, the Court found there was powerful evidence that defendants' conduct was "substantially, *if not entirely*, motivated by political considerations." *Id.* at 780 (emphasis added).

On April 1, 1996, plaintiffs filed suit under Section 1983 against Grant and Mason. J.A. 15.[3] In response to the Complaint Grant and Mason filed a motion to dismiss pursuant to Rule 12(b)(6), contending they could not be liable because Read, and not they, had the sole statutory

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that Grant and Mason had not reappointed Arnold because of her political affiliation with the Democratic Party and awarded her $150,000 in damages. *Sales I*, 158 F.3d at 774.

[3] "J.A. ___" refers to the Joint Appendix filed in the Fourth Circuit in *Sales II*. "S.J.A. ___" refers to the Joint Appendix filed in *Sales I*.

authority under Virginia law to appoint assistant registrars. J.A. 291-297.

In their reply memorandum in support of their motion to dismiss, served on July 19, 1996, Grant and Mason expressly acknowledged their understanding that plaintiffs sought to hold *them* liable for *causing* Read not to reappoint plaintiffs. J.A. 298-305. Grant and Mason denied liability because they did not have the statutory authority to appoint assistant registrars and argued that plaintiffs' theory of "proximate cause" was not "sufficient" to "bring their case within the ambit of Section 1983 . . . ." J.A. 302. Ironically, in support of their positions, defendants cited and attempted to distinguish the very cases cited by the Fourth Circuit in *Sales I* which defendants now say has *never* been the law. These cases, however, demonstrate that the principle of effective causation by indirect means has long been well established under the law of Section 1983, including *Malley v. Briggs*, 477 U.S. 345 (1986) and *Slakan v. Porter*, 737 F.2d 368, 372 (4th Cir. 1984). *Compare Sales I*, 158 F.3d at 776, *with* J.A. 302-303.

Despite the recognition of the causation theory, defendants at no time asserted qualified immunity as a basis for their motion to dismiss. J.A. 291-305. On September 23, 1996, the District Court denied the motion to dismiss. S.J.A. 12. On October 11, 1996, Grant and Mason filed their Answer to the Complaint. *See* Answer. Grant and Mason cursorily referenced qualified immunity in their Answer, among others.

The parties engaged in extensive discovery and a trial date was set for April 1-4, 1997. On February 20, 1997, Grant and Mason filed a motion for summary judgment. *See* February 20, 1997 Motion for Summary Judgment of

Defendants and Memorandum in Support. In the motion for summary judgment, defendants *conceded* that the principle of effective causation by indirect means was an established legal theory, but argued they could not be liable for causing Read not to reappoint plaintiffs unless there was "evidence of fraud or duress" exercised upon Read. *See* Defendants' Mem. in Support of Motion for Summary Judgment at pp. 9-10. Again, the defendants did not mention qualified immunity.

The District Court did not rule on the motion for summary judgment and a four-day trial was held between April 1-4, 1997. After the presentation of both the plaintiffs' and defendants' evidence, the defendants moved under Rule 50 for dismissal of the case based on a factual argument that Read had made up her own mind and had not been caused by Grant and Mason not to reappoint plaintiffs. S.J.A. 1009-1011. Defendants at no time mentioned qualified immunity. The District Court granted defendants' motion under Rule 50.

Plaintiffs appealed and on October 14, 1998, the Fourth Circuit reversed the decision and remanded the case for a new trial. *See Sales I*, 158 F.3d 768. Again, the defendants did not mention qualified immunity during the appeal. In holding there was abundant evidence from which the jury could have decided Grant and Mason caused plaintiffs not to be reappointed for political reasons, the Fourth Circuit noted that the applicable law was clearly established, stating: "The governing law under which we assess the evidence here is settled and undisputed." *Id.* at 775.

Upon remand, the case was set for trial on June 1-4, 1999. In mid-April 1999, plaintiffs consented to a

substitution of defendants' counsel on the condition that there would be no continuance of the trial date. *See* April 16, 1999 Order. Instead of seeking a continuance, Grant and Mason filed on or about May 3, 1999 (less than one month before the second trial), two motions for summary judgment, contending they were entitled to qualified and Eleventh Amendment immunity. J.A. 25-26, 134-137.[4] This was the first time, after over three years of litigation, a trial, and an appeal, that these defenses had been raised with the Court, other than the passing reference to qualified immunity in defendants' initial answer.

Plaintiffs moved to quash the motions for summary judgment on the grounds they were meritless and untimely. Pet. 150-160. On May 17, 1999, the District Court agreed with plaintiffs and quashed the motions for summary judgment. Pet 49a. The Court explained it was "inappropriate for the defendants to raise the defenses of qualified immunity and Eleventh Amendment immunity at this late date." Pet. 52a. In addition, the District Court rejected the merits of defendants' qualified immunity argument, finding that the law had been "clear" and that *Sales I* did "not deviate from existing law on what level of activity constitutes causation." Pet. 52a.

In response, defendants filed a notice of appeal and a motion for stay. J.A. 314, 187. In an effort to avoid another substantial delay, having already been through a full trial and an appeal, and because plaintiffs considered the issues frivolous, plaintiffs filed a motion asking the District Court

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[4] Of course, these motions ultimately had the effect of a lengthy continuance because they allowed defendants to file an interlocutory appeal. When this appeal is over, defendants will have obtained a delay of more than two years.

to certify the appeal as frivolous and retain jurisdiction to proceed to trial. The District Court granted the motion, certified the appeal as frivolous, and retained jurisdiction. Pet. 54-55a. The District Court found, among other things, that the qualified immunity "defense giving rise to the appeal has been *waived* because it should have been raised and decided prior to the first trial in this case . . . ." Pet. 54a. (emphasis added). The Fourth Circuit determined, however, that the District Court did not have the authority to certify the appeal as frivolous and applied the automatic stay rule. J.A. 289.

Plaintiffs filed a motion to dismiss the appeal on the grounds that Grant and Mason waived their right to assert the defense of qualified immunity by failing to pursue it any time during the first trial or the first appeal. *See* Motion of the Appellees to Dismiss the Appeal. On August 16, 2000, the Fourth Circuit in *Sales II* granted the motion to dismiss and held that Mason and Grant had waived their claims of qualified immunity by failing to pursue the claim at any time prior to the remand of *Sales I*. The Court explained as follows:

> Although Mason and Grant technically pled their qualified immunity defense in their answers to the initial complaint, they *never* explained the legal or factual basis for their claim of qualified immunity prior to remand after *Sales I*. Indeed their mention of qualified immunity in their answers consisted of only a single, cursory sentence on the matter, contained in a listing of several affirmative defenses . . . .

> And, . . ., although the defendants had numerous opportunities prior to remand to assert their claim of qualified immunity, they failed to do so. Specifically, Mason and Grant omitted any mention of qualified immunity from their pre-trial motions to dismiss and for summary judgment, from the presentation of their case during a four-day trial, and from their post-trial motion for dismissal. As such, prior to remand after *Sales I*, the notion that qualified immunity might play a role in Mason and Grant's defense was mentioned to the district court only once, and even on that occasion [in the answer], the defendants failed to provide any explanation as to how or why qualified immunity might apply. Under these circumstances, we have no trouble concluding that the defendants waived their right to press seriously their claim of qualified immunity for the first time after remand.

Sales II, 224 F.3d at 296 (emphasis added).

The defendants filed a petition for rehearing and rehearing *en banc* which was denied by the Fourth Circuit. A new trial date has been scheduled in the Western District of Virginia, to commence on July 9, 2001.

REASONS FOR DENYING THE WRIT

I. There Is Nothing Unusual About The Decision of the Fourth Circuit In *Sales II*, Which Is Fully In Accord With Established Precedent, The Interests Of Justice, And The Enhancement Of Judicial Economy.

A. Qualified Immunity Is Waivable.

The Fourth Circuit's decision in *Sales II* is fully in accord with substantial precedent from this Court, the Fourth Circuit, and numerous other Circuit Courts of Appeals which recognize that qualified immunity is a waivable defense. As this Court has held, "qualified immunity questions should be resolved at the earliest possible stage of litigation." *Anderson v. Creighton*, 483 U.S. 635, 642, n. 6 (1987). This is true for several reasons, including that there is a right of interlocutory appeal and the parties should not be made to go through the expense and effort of a trial if the issue will resolve the case at an early stage. Moreover, there is great potential for strategic delays caused by raising the defense at a late date and then pursuing an interlocutory appeal. *See Guzman-Rivera v. Rivera-Cruz*, 98 F.3d 664, 667 (1st Cir. 1996) ("In order to reduce the potential for abuse by defendants, we believe that the defense of qualified immunity may be deemed to have been waived if it is not raised in a diligent manner during the post-discovery, pre-trial phase. To find otherwise is to invite strategic use of the defense by defendants who stand to benefit from delay.").

A defendant who fails to pursue a qualified immunity defense in a timely manner has waived that defense. In *Suarez Corp. Industries v. McGraw*, 125 F.3d 222, 226 (4th Cir. 1997), the Fourth Circuit acknowledged the general rule that the defense of qualified immunity would be waived and could not be raised at a later stage if it "was not squarely

before the district court" in the initial trial court proceedings. Although the defendants in *Suarez* claimed the defense was alluded to in a memorandum filed with the district court, the defense was not developed or preserved in any meaningful sense and therefore was waived. *Id.*, citing *Buffington v. Baltimore*, 913 F.2d 113, 120-22 (4th Cir. 1990) (holding that a Court would not "consider *sua sponte* a defense of qualified immunity in a § 1983 action when it was not properly preserved below"). In holding that qualified immunity could be waived, the Fourth Circuit noted in *Suarez* that "other circuits [were] in agreement." *Suarez*, 125 F.3d at 226, citing with approval *Caban-Wheeler v. Elsea*, 71 F.3d 837, 842 (11th Cir. 1996) (rejecting summarily the defendant's assertion of qualified immunity to a § 1983 claim because it was not raised in the District Court); and *Berryman v. Regiler*, 47 F.3d 1167, 1995 WL 31575, at *4 (6th Cir. 1995) (unpublished) (refusing to consider a defense of qualified immunity in a § 1983 action when the defense was not raised).

B. A Mere Reference To Qualified Immunity In An Answer Does Not Allow A Defendant To Delay Unreasonably In Pursuing The Defense.

It is also well established that merely mentioning the defense of qualified immunity in an answer is not sufficient to preserve the defense for all time. A party may not unreasonably delay pursuing the defense or it will be waived. *See Blissett v. Coughlin*, 66 F.3d 531, 538-39 (2d Cir. 1995) (the defense of qualified immunity was waived and defendants could not raise it on the morning of trial where although the defendants referenced immunity in their answer, they failed to "adequately develop a qualified immunity defense during [five years of] pretrial proceedings," they made no mention of the defense in

pretrial memoranda of law, and they had offered no jury instructions on the issue); *Lord-Butcher v. City of Newport Beach*, 79 F.3d 1153, 1996 WL 111588 (9th Cir. 1996) (unpublished) (defendants waived qualified immunity by not including the defense in the pretrial order and waiting until after the close of evidence to raise the issue); *Buenrostro v. Collazo*, 973 F.2d 39, 44 (1st Cir. 1992) (Where the defendants asserted one theory of qualified immunity, they could not later "switch horses" and assert another theory of qualified immunity on appeal: "[q]ualified immunity is, after all, an affirmative defense, and the 'right' to have it determined in an intermediate appeal can be waived if it is not properly asserted below."); *Maul v. Constan*, 928 F.2d 784, 785 (7th Cir. 1991) (although defendant may have technically pled qualified immunity as a defense, the defense was waived when he "did not press [the defense] in any pretrial motions, at the pretrial conference, or at trial").

The case of *Walsh v. Mellas*, 837 F.2d 789 (7th Cir. 1988), which plaintiffs have cited repeatedly, but which is conspicuously missing from the Petition, is squarely on point. *Walsh* held that a qualified immunity defense was waived and could not be pursued in a new trial after remand where the defendant had failed to pursue the defense during the first trial. In so holding, the Court relied on principles of judicial economy and efficiency which require that the defense of qualified immunity be brought to the attention of the trial court at the earliest possible time. *Id.* at 799-800, n.7. To allow a defendant to raise qualified immunity for the first time on appeal or on remand would be to condone piecemeal litigation, which is antithetical to the interests of the judicial system and public policy.

In *Walsh*, the defendants asserted qualified immunity as an affirmative defense in their answer, but never pursued

the issue again until after a first trial (in which the defendants had prevailed) and a reversal and remand by the Seventh Circuit. *Id.* at 800. On remand for a second trial, the defendants for the first time attempted to pursue an immunity defense, but the Court held that the defense had been waived. *Id.* The reasoning of the Seventh Circuit was supported by substantial authority and is remarkably pertinent here:

> As with other affirmative defenses upon which the defendants bear the burden of proof . . ., the defense of qualified immunity may be deemed waived if not properly and timely presented before the district court. In *Walsh I,* the defendants 'raised' the defense in their answer, but failed to bring the argument to the court's attention, despite their having numerous opportunities to do so. The cases holding that an omission of this character constitutes a waiver of the right to present that issue on appeal are legion . . . . 'A trial judge may properly depend upon counsel to apprise him of the issues for decision. He is not obligated to conduct a search for issues which may lurk in the pleadings.' . . . It is clear from our review of the district court proceedings in *Walsh I,* that defendants abandoned the defense.

Id. at 799-800 (citations omitted) (emphasis added).

The Court explained further that the defendants' failure to raise the issue of qualified immunity in the first appeal also precluded them from asserting the defense on

remand. *Id.* at 800. Again, the striking similarity of *Walsh* to the present case is apparent:

> Additionally, the qualified immunity defense was not raised on appeal in support of the district court's holding in *Walsh I*. Defendants contend that the failure to press the issue on appeal is excusable since they were at the time defending a district court decision that did not address the issue of qualified immunity. True, the district court did not address the issue, for the parties failed to raise their possible immunity at trial. Defendants' excuse—that they did not raise the issue in the *Walsh I* appeal because the district court did not decide the case on that ground – does not cure the initial problem for had they lost in the district court, they still would have been precluded from advancing the qualified immunity defense on appeal because of their failure to raise the issue in the trial court. *Once district court proceedings conclude and defendant fails to raise an affirmative defense, the defendant simply forfeits his or her right to assert that defense on appeal . . . Consequently, defendants' assertion of the defense of qualified immunity on remand from Walsh I, . . ., and in this second appeal, comes too late.*

Id. (emphasis added) (citations omitted).

The present case is indistinguishable from the numerous authorities cited above. Grant and Mason pled qualified immunity as an affirmative defense and had every opportunity to pursue it during *Sales I*. At no time did Grant or Mason argue or even mention qualified immunity as a

basis for judgment in their favor. Instead, petitioners themselves submitted a proposed jury instruction and a Special Verdict Form which adopted without equivocation the well-established principle that they could be liable as the effective cause of plaintiffs' constitutional injuries, the very theory defendants now disingenuously contend was not clearly established.[5] Accordingly, neither the District Court in the first trial nor the Fourth Circuit on appeal in *Sales I* had the opportunity to address the issue and to prevent exactly what has now happened – *inexcusable delay and piecemeal litigation.*

In short, the Fourth Circuit was well within the bounds of settled law when it held that Grant and Mason waived their right to assert the defense of qualified immunity. *See Powell v. Nevada*, 511 U.S. 79, 87 (1994) (Thomas, J., dissenting) ("We make poor use of judicial resources when, as here, we take a case merely to reaffirm . . . settled law."). If Grant and Mason truly believed they had a legitimate qualified immunity defense, they should have raised it in the first trial. Their failure to do so has already unnecessarily and substantially increased the expense of the parties and burdened the judicial system. Petitioners should not be allowed to use the defense of qualified immunity to strategically delay a case beyond reason and to wage a war of attrition. Instead, as the Fourth

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[5] See Affidavit of David E. Constine, III, which was attached as Exhibit B to the Motion to Dismiss, and which attaches the pertinent instruction and Special Verdict Form. Petitioners' own proposed instruction conceded that Grant and Mason could be liable for causing Read not to reappoint plaintiffs if the jury found 1) they "actually exerted such influence over Ms. Read's hiring decision and that [plaintiffs'] political party affiliation … was a substantial or motivating factor for Grant or Mason to seek to influence Carol Read's hiring decision," and 2) that Read's decision not to reappoint plaintiffs "was in fact influenced by Grant or Mason …."

Circuit found in *Sales II*, the defense was clearly waived and the Petition should be denied.

C. *Sales II* Does Not Conflict With Any Authority From This Court, The Fourth Circuit, Or Other Circuit Courts of Appeal.

In a transparent attempt to present a basis for this Court's review, petitioners cavalierly assert that *Sales II* is in conflict with precedent from other Circuits. The truth is otherwise, as is confirmed from a review of the cases cited by petitioners. Indeed, plaintiffs are aware of no cases, and petitioners cite none, holding that qualified immunity is *not* waivable or that qualified immunity may be raised on remand when it was simply referenced in an answer and never argued or developed at any time before remand.

Sales II is not contrary to Fourth Circuit precedent, as the Fourth Circuit explained it had never addressed the waiver of qualified immunity "under the exact circumstances present here." As explained above, however, *Suarez* articulated the general rule that qualified immunity can be waived when it is not properly raised in the district court, which is also the holding in *Sales II*. *Suarez* and *Sales II* are also consistent with precedent from the Fourth Circuit holding that the failure to press qualified immunity as a defense during the course of litigation can constitute waiver of the defense. *See, e.g., Brooks v. Davis*, 1998 U.S.App. LEXIS 7968 (4th Cir. 1998) (unpublished) (finding that defendants waived their right to assert qualified immunity after trial, notwithstanding that they had asserted the defense in their answer, but not at any other stage, explaining that to "the extent that defendants challenge the district court's denial of summary judgment based on their claim of qualified immunity, raised only in their answer, they waived this claim by failing to raise it in their motion for summary

judgment or their objections to the magistrate judge's report."); *Wilkes v. Young*, 28 F.3d 1362 , 1377, n.12 (4th Cir. 1994) (Phillips, J., dissenting) (recognizing that qualified immunity could be waived, citing *Walsh* and other authorities, and finding that defendant had waived the defense by failing to develop and pursue it, notwithstanding that the defense had been initially pled in the answer, explaining "[t]hough Young pleaded . . . qualified immunity in his answer, he did not assert it . . . prior to his trial, ask that it be submitted to the jury, urge it as a ground for overturning the verdict in his post-verdict JNOV motion, or otherwise press it in the trial court . . . .")

In support of their alleged "conflict," petitioners place great reliance on the cases of *Santos v. District Council of New York*, 619 F.2d 963, 967 (2d Cir. 1980) and *Kultzer v. — Pittsburgh-Corning Corp*, 942 F.2d 122, 125 (2d Cir. 1991). These cases, however, have nothing to do with the issue of qualified immunity. They simply hold that a defendant who *generally* pleads a statute of limitations defense need not do so with specificity and that a statute of limitations defense is "sufficiently raised for purposes of Rule 8 by its bare assertion" in an answer. *Santos*, 619 F.2d at 967. In both *Santos* and *Kultzer*, the defendants generally raised statute of limitations defenses in their answers and then pursued specific defenses at trial. Not surprisingly, the courts held this was permissible under the notice pleading requirements of Rule 8. Neither case addressed or mentioned qualified immunity.

Petitioners also rely on *Daingerfield Island Protective Service Co. v. Babbitt*, 40 F.3d 442, 445 (D.C. Cir. 1994). Again, *Daingerfield* has nothing to do with qualified immunity. Instead, the issue was whether defendants had waived a statute of limitations defense by not

raising the issue until after a remand. Although the Court found no waiver of that defense, *Daingerfield* did not involve a defense which could be appealed on an interlocutory basis, such as qualified immunity. Unlike the denial of a statute limitations defense, a denial of qualified immunity can be immediately appealed, thereby wreaking havoc with the trial schedule and causing substantial delays. Accordingly, the potential for abuse is obvious and real. Waiver may be the only shield a plaintiff has against a defendant who, as in this case, uses qualified immunity as a sword for purposes of delay. A finding of waiver in the qualified immunity context is consistent with the admonition of the Supreme Court that defendants must raise the issue "at the earliest possible stage of litigation." *Anderson*, 483 U.S. at 642, n.6.

In sum, petitioners have cited no case which conflicts with the decision in *Sales II*. There is no dispute that qualified immunity is waivable; and the unforgivable delay caused in this case by the defendants' failure to pursue the defense at any time prior to remand precludes them from pursuing it now. To hold otherwise would encourage defendants to engage in a strategy of delay by waiting until the last possible moment to raise the defense, knowing they could safely assert it without waiver and then file an interlocutory appeal if it was denied. This type of conduct is a pox on the system and should not be encouraged or condoned.[6]

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[6] In light of the egregious circumstances under which petitioners have belatedly raised their qualified immunity defense (i.e., after a full trial and appeal and a mere month before the second trial of this matter), their claim that "there is no showing that the petitioners had pursued a strategy of delay which has prejudiced the respondents" rings hollow. Pet. Brief, at 15. Indeed, petitioners' have tirelessly pursued for two years a

- footnote continued -

II. The Excuses Offered By Petitioners For Their Delay In Pursuing Qualified Immunity Are Baseless.

A. *Sales I* Did Not Change The Law Or Create New Law.

In the face of the substantial authorities demonstrating the correctness of the *Sales II* decision, petitioners attempt to distract this Court by focusing on the holding in *Sales I*.[7] Specifically, petitioners claim that *Sales I* "changed" and "expanded" the law and that this "change" somehow justified their more than three-year delay in pursuing a qualified immunity defense. Pet. Brief at 2, 4, 6-8.

Sales I did not change the law whatsoever. Instead, the governing law was clearly established at the time that Mason and Grant, for partisan reasons, intentionally caused respondents not to be reappointed as Assistant Registrars. Specifically, the law was clear: (1) that Assistant Registrars were protected by the First and Fourteenth Amendments from adverse employment actions based on their political affiliations; and (2) that persons acting under color of state law, such as Mason and Grant, could not, either directly or indirectly, cause the deprivation of another individual's constitutional rights. *See McConnell v. Adams*, 829 F.2d 1319 (4th Cir. 1987); *Sales I*, 158 F.3d at 775-76 (and the numerous cases cited therein); 42 U.S.C. § 1983.

The law has been clearly established for 130 years since the enactment of Section 1983 that a person acting

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substantively frivolous qualified immunity defense for precisely that purpose.

[7] Indeed, petitioners' entire "change in the law" argument is really nothing more than an attack on the merits of the holding in *Sales I*. Besides the fact that *Sales I* is absolutely correct, the time for any attack on that decision has passed.

under color of state law may be liable for effectively causing a constitutional deprivation, regardless whether that deprivation was caused by direct or indirect means. This well settled principle of law is derived from the literal language of Section 1983 and ample precedent from this Court, the Fourth Circuit, and every other court that has considered the issue. *See Sales I*, 158 F.3d at 775-76 (and the numerous cases cited therein). Section 1983 provides that a person who, "under color of [state law] subjects, or *causes to be subjected*, any [person] to the deprivation of any rights . . . secured by the Constitution . . ., shall be liable to the party injured. . . ." (emphasis added). This language simply articulates the principle of proximate cause, which is part and parcel of every Section 1983 case. *See Malley v. Briggs*, 475 U.S. 335, 344, n.7 (1986) (where this Court, quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961), held that § 1983 liability is imposed based on principles from "tort liability that make[] a man responsible for the natural consequences of his actions.").

In *Sales I*, the Fourth Circuit cited numerous authorities from this Court and other Circuits which demonstrated that the law governing the conduct of Grant and Mason was clearly established. *Sales I*, 158 F.3d at 775-76. Petitioners claim that *Sales I* was a "change" in the law because it was the first time the Fourth Circuit had ever applied the proximate cause concept of effective causation by indirect means in the context of an *Elrod-Rutan* case. Pet. Brief at 7. This argument is not only without logic, it is wrong as a factual matter. *See, e.g., Coston v. Hooper*, 885 F.2d 864, 1989 WL 106994 (4th Cir. 1989) (unpublished) (where the Court properly applied indirect causation principles to uphold liability against two individuals who, while not having the direct authority to do so, effectively caused the termination of a state employee because he

refused to fire employees who were affiliated with the Democratic party). *See also Conner v. Reinhard,* 847 F.2d 384, 396-97 (7th Cir. 1988) (city alderman who recommended the firing of city employee, even though he had no direct firing authority, could be liable under Section 1983 because ". . . direct participation by a defendant is not necessary . . . . The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or should of known would cause others to deprive plaintiff of her constitutional rights").

Indeed, petitioners' suggestion that political affiliation discrimination cases are somehow exempt from basic proximate cause concepts such as effective causation through indirect means is simply ridiculous. Political affiliation discrimination cases are no different than any other Section 1983 cases with respect to principles of causation. As is clear from the authorities cited above, general tort principles, including basic principles of proximate cause, govern the *entire* body of Section 1983 jurisprudence, without exception to any category. Those principles, as applied in the Fourth Circuit and elsewhere, plainly permit a plaintiff to establish liability under Section 1983 through both direct and *indirect* means. Not surprisingly, petitioners have cited no case which adopts their position or even suggests it is correct.

Simply put, there is nothing unusual about the Fourth Circuit's application of effective causation principles in *Sales I.* Accordingly, there is no doubt that had petitioners raised a qualified immunity defense in a timely fashion (which they did not), such a defense would have been hopelessly futile.

B. Petitioners Have At All Times Known That Plaintiffs Were Relying Upon A Theory Of Effective Causation To Hold Them Liable For Their Unlawful Actions.

Petitioners claim they never raised qualified immunity because they did not know prior to *Sales I* that they could be found liable under a theory of effective causation by indirect means. This argument is completely contradicted by the record of this case and can only be regarded as disingenuous.

There is no dispute that plaintiffs' theory of the case is the same today as the day the case was filed almost six years ago. The Complaint expressly alleges that Grant and Mason, through their influence and control over Read, caused her to not reappoint plaintiffs as the Assistant Registrars. J.A. 22-23. Petitioners therefore were fully aware that plaintiffs were accusing them of being the effective cause of their non-reappointment, as evidenced by the defenses petitioners asserted in their motions to dismiss and for summary judgment. In each of these motions, petitioners argued they could not be the "*proximate cause*" of plaintiffs' constitutional deprivations because Carol Read was the appointing authority. J.A. 302. In support of their motion to dismiss in 1996, petitioners even cited and attempted to distinguish the seminal cases from this Court applying the well established theory of effective causation by indirect means, such as *Malley v. Briggs*, 475 U.S. 335 (1986). J.A. 302-03. Petitioners obviously knew plaintiffs were attempting to hold *them* liable for causing Read not to reappoint plaintiffs because plaintiffs have made no attempt in this case to hold *Read liable*. For petitioners now to try and assert they were unaware of plaintiffs' legal theory until after *Sales I* was decided is nothing short of specious.

C. Petitioners' Argument Concerning A Change In "Legally Relevant Factors" Is A Concoction That Has No Support In The Law.

Without any meaningful explanation, petitioners contend that *Sales I*, by "changing" the law, "radically altered" the "legally relevant factors" involved in a determination of qualified immunity and the Fourth Circuit somehow erred by failing to inquire into this alleged radical alteration of these "factors." Pet. Brief at 6-8. Petitioners have never made this argument at any other stage of the proceedings, and it is such a strained and disjoined concoction that it barely warrants rebuttal.

As an initial matter, there has been no change in any "legally relevant factors" in this case. The theory of effective causation through indirect means, which petitioners challenge as groundbreaking law: (1) has been the essence of plaintiff's case since the day it was filed; (2) is simply a proximate cause principle; and (3) has been a clearly established part of Section 1983 jurisprudence since the statute was enacted.

Moreover, the concept of "legally relevant factors," which petitioners make no attempt to explain, has nothing to do with this case. The "legally relevant factors" phrase is simply descriptive terminology that petitioners have pulled out of context from *Behrens v. Pellitier*, 516 U.S. 299 (1996), a case where the issue of waiver was never addressed or mentioned. In *Behrens*, the Court addressed whether a defendant could file successive interlocutory appeals after the district court denied qualified immunity on a motion to dismiss, and then again after a denial of summary judgment. In this context, the Court used the phrase "legally relevant factors" in reference only to the difference between raising a qualified immunity defense on a motion to dismiss and on a

motion for summary judgment. The Court explained as follows:

> [R]esolution of [qualified immunity] may 'require more than one judiciously timed appeal,' because the *legally relevant factors* bearing upon the *Harlow* question will be different on summary judgment than on an earlier motion to dismiss. At that earlier stage, it is the defendants' conduct, *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness.' On summary judgment, however, the plaintiff can no longer rest on the pleadings . . . and the court looks to evidence before it (in the light most favorable to the plaintiff) when conducting the *Harlow* inquiry.

Id. at 309. (emphasis added). Thus, the concept of "legally relevant factors" has no applicability to the issue of waiver presented in this case where qualified immunity has been raised only once and there is no issue as to the propriety of successive interlocutory appeals because only one such appeal has been made.

D. Petitioners Cannot Hide Behind The First Amendment To Support Their Claim Of Qualified Immunity.

In a further effort to avoid liability, petitioners attempt to wrap themselves in the First Amendment, sounding the false alarm that the Fourth Circuit has denied them "important First Amendment rights." Pet. Brief at 9. In doing so, petitioners make two arguments: (1) that *Sales I*, which held they could be liable for their conduct, denied petitioners their First Amendment rights to engage in "core

public or partisan speech," such as speaking out "strongly about public matters, even in a partisan way," *See* Pet. Brief at 10-11; and (2) that qualified immunity is available where there is a balancing of competing First Amendment interests, *see* Pet. Brief at 10-11. Again, petitioners are still attacking *Sales I*, which opportunity passed long ago, and their arguments, in any event, have no support in law and must be rejected.

1. The First Amendment Does Not Protect A Government Official Who Is Engaged In Discrimination.

The petitioners have not been denied any of their First Amendment rights. Petitioners completely disregard the evidence discussed in *Sales I*, and the inferences drawn therefrom, and try to portray themselves as public officials who were innocently doing nothing more than voicing recommendations and providing input. Petitioners' argument presents a question of fact which has nothing to do with qualified immunity and is contradicted by the evidence in this record. Indeed, the record evidence discussed in *Sales I* amply supports a finding that Mason and Grant were far from innocent and instead were "substantially, if not entirely, motivated by political considerations" to engage in discriminatory *conduct*. *Sales I*, 158 F.3d at 780.

Whether petitioners actually discriminated or whether they were innocently exercising their First Amend rights is a question of fact that has nothing to do with qualified immunity or the waiver thereof. If a jury determines that petitioners were motivated by politics to cause the non-reappointment of plaintiffs, then petitioners are liable because the First Amendment does not protect a government official engaged in discrimination. *See, e.g., Baty v. Willamette Industries, Inc.*, 172 F.3d 1232 (10th Cir. 1999)

(imposing liability on employer for failing to regulate its employee's harassing speech under Title VII does not violate the First Amendment because the "speech in question amounts to discriminatory conduct, not just speech"); *Vililaneuva v. Wellesley College*, 930 F.2d 124, 129 (1st Cir. 1991) (academic freedom [under First Amendment] does not embrace the freedom to discriminate); *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 360 (1st Cir. 1989) (First Amendment protection "does not include the freedom to discriminate . . . on the basis of sex or other impermissible grounds").

2. No Balancing Test Was Required To Determine Whether *Plaintiffs* Had A First Amendment Right To Be Free From Political Affiliation Discrimination.

Petitioners also cannot claim that they are entitled to qualified immunity because they had to engage in a "balancing test" to assess whether plaintiffs had a right to be free from political affiliation discrimination. Plaintiffs' right to be free from political affiliation discrimination was clearly established in *McConnell v. Adams*, which obviates any need for a balancing test. Nonetheless, petitioners suggest there are competing interests in this case, i.e. petitioners' First Amendment rights in free speech vs. plaintiff's First Amendment right to be free from political affiliation discrimination, and therefore they are entitled to qualified immunity.

Petitioners' argument fails because no balancing test is required when a plaintiff, such as in this case, had a clearly established and absolute right to be free from political affiliation discrimination. Petitioners argue they are entitled to qualified immunity because their alleged First Amendment right to free speech, which in this case was

discriminatory speech and conduct, must be balanced against plaintiffs' First Amendment right to be free from discrimination and, as a result, defendants are entitled to qualified immunity. This is not the law and petitioners cite no case to support such an argument. If this test were adopted, any government official who engages in discrimination and causes a plaintiff to be subjected to an adverse employment decision could claim immunity on the simple grounds that he (the defendant) was exercising his right of free speech. Any such holding would substantially eviscerate the protections afforded by Section 1983.

CONCLUSION

The Fourth Circuit's decision in *Sales II* was correct and straightforward; the issues presented are neither novel nor difficult; and petitioners' challenges to both *Sales II* and *Sales I* are strained and meritless. The Petition for Writ of Certiorari should be denied and the case should be allowed to proceed to trial on July 9, 2001, as scheduled.

Anthony F. Troy
David E. Constine, III
Troutman Sanders Mays & Valentine LLP
P. O. Box 1122
Richmond, Virginia 23218-1122
(804) 697-1200
FAX: (804) 697-1339

Counsel of Record